RECORD AND BRIEFS

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No.

In the Supreme Court of the United States

LAMAR, ARCHER & COFRIN, LLP,
Petitioner,

v.

R. SCOTT APPLING,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Bankruptcy Code prohibits the discharge of "any debt . . . for money, property, [or] services . . . to the extent obtained by . . . false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's . . . financial condition." 11 U.S.C. § 523(a)(2). Three Circuits have held that a statement concerning a specific asset of the debtor cannot be a "statement respecting the debtor's . . . financial condition." Two Circuits, including the Eleventh Circuit below, have held that it can be. Based on that interpretation, the Eleventh Circuit here reversed the bankruptcy court's conclusion that the debt at issue "is nondischargeable," App. 14a, even though it is based on a fraudulent statement.

The question presented is whether (and, if so, when) a statement concerning a specific asset can be a "statement respecting the debtor's . . . financial condition" within Section 523(a)(2).

RULE 29.6 STATEMENT

Petitioner Lamar, Archer & Cofrin, LLP, is a limited liability partnership. Petitioner has no parent corporation, and no publicly held company owns 10% or more interest in the partnership.

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PETITION FOR A WRIT OF CERTIORARI

Lamar, Archer & Cofrin, LLP (Lamar) respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-19a) is reported at 848 F.3d 953. The opinion of the district court (App. 20a-44a) is unreported. The order of the bankruptcy court denying respondent's motion to dismiss (App. 67a-81a) is reported at 500 B.R. 246. The bankruptcy court's findings of fact and conclusions of law (App. 45a-66a) are reported at 527 B.R. 545.

JURISDICTION

The court of appeals entered judgment on February 15, 2017. App. 1a-2a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 523 of the Bankruptcy Code, 11 U.S.C. § 523, provides in relevant part:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—
>
> . . .
>
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—
>
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition; [or]
>
> (B) use of a statement in writing—

> (i) that is materially false;
>
> (ii) respecting the debtor's or an insider's financial condition;
>
> (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and
>
> (iv) that the debtor caused to be made or published with intent to deceive . . . .

STATEMENT

This case concerns an expressly acknowledged and now entrenched circuit conflict over the meaning of a provision of the Bankruptcy Code dealing with the dischargeability of a commonly recurring type of debt. One of the time-honored rules of bankruptcy is that it is intended to provide a fresh start for the "honest but unfortunate debtor." *Cohen v. de la Cruz*, 523 U.S. 213, 217 (1998) (citation omitted). In keeping with that objective, the Bankruptcy Code provides broad relief for individual debtors, but prohibits the discharge of debts that result from dishonest or fraudulent conduct. This case concerns whether Congress intended to drive a truck through that general policy, or just tweak it to address a particular situation that had arisen, when it amended Section 523(a)(2)(A) of the Bankruptcy Code.

Section 523(a)(2)(A) of the Code generally bars the discharge in bankruptcy—whether under Chapter 7, 11, 12, or 13—of debts obtained by "false pretenses, a false representation, or actual fraud," with one exception: a debt obtained by fraudulent means where the fraud consists of a false "statement respecting the debtor's . . . financial condition." This "financial condition" exception was added to the Code in 1960 to address the practice among certain consumer finance companies of coaxing loan applicants into submitting

false or misleading financial statements in order to insulate (or arguably insulate) the resulting debts to the bank from any future discharge in bankruptcy. *See Field v. Mans*, 516 U.S. 59, 76-77 & n.13 (1995).[1] In response, Congress singled out such debts and subjected them to additional rules before they could be exempted from discharge. *See* 11 U.S.C. § 523(a)(2)(B).

The question presented in this case is whether a false statement that concerns a *specific* asset—as opposed to a debtor's financial health more generally, as is typically required, for example, by an application for credit—is a "statement respecting the debtor's . . . financial condition," such that a debt obtained on that basis is dischargeable unless it meets the heightened standard in Section 523(a)(2)(B). In this case, the debtor (respondent) intentionally made a false statement to the creditor (petitioner) about an "anticipated tax refund"—a single asset—in order to receive an extension of credit on services that he had secured and hoped to continue to receive. App. 6a. The bankruptcy court and district court held that this was *not* a statement respecting the debtor's financial condition; the Eleventh Circuit held otherwise.

As the Eleventh Circuit below recognized, "[t]he circuits and other federal courts are split on this question." *Id.* The Fourth Circuit has held that a statement about a single asset can be a statement

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[1] In *Field*, this Court considered "the level of a creditor's reliance on a fraudulent misrepresentation necessary to place a debt . . . beyond release" under Section 523(a)(2)(A), 516 U.S. at 61—a different issue than the one presented here. But in deciding that question, the Court discussed the history of the "financial condition" exception. *See id.* at 64-66, 76-77 & n.13.

respecting the debtor's financial condition, while the Fifth, Eighth, and Tenth Circuits have all held that it is not. In the decision below, the Eleventh Circuit sided with the Fourth, deepening the split and removing any doubt that it is here to stay until resolved by this Court. Particularly given the importance of uniformity in bankruptcy, there is no reason why this Court should tolerate the result where a common class of debts is dischargeable in some parts of the country but not others. The question presented warrants review, and this case presents an ideal vehicle to resolve it.

A. Factual Background

Petitioner Lamar, Archer & Cofrin, LLP (Lamar), is a law firm located in Atlanta, Georgia. In 2004, respondent R. Scott Appling hired Lamar and Walter Gordon to represent Appling in litigation against the former owners of a business he had recently purchased. App. 21a. Appling agreed to pay Lamar and Gordon on an hourly basis with fees due monthly. *Id.* As the litigation proceeded, Appling fell behind in his payments for the services he received. *Id.*

By March 2005, Appling owed Lamar more than $60,000 and Gordon $18,000 in unpaid legal fees. *Id.* Lamar informed Appling that if he were unable to bring fees current, Lamar would be forced to terminate its representation in an appropriate manner. *Id.* at 21a-22a. The parties met in Gordon's office on March 18, 2005, to discuss the situation. *Id.* at 22a.

At the meeting, Appling told Lamar and Gordon that he had consulted an accountant, and that he would soon be filing an amended tax return, entitling him to a tax refund of approximately $100,000—enough to cover current and future legal fees. *Id.* at 22a, 54a. Based on

that representation. Lamar and Gordon agreed to continue their representation of Appling. *Id.* at 41a, 62a.

In November 2005, Lamar and Appling met again to discuss the outstanding legal fees and Lamar's continued representation. In the November meeting, Appling informed Lamar that his accountant had improperly handled the amended return. *Id.* at 22a-23a, 57a-60a. As a result, Appling claimed, he had been forced to refile the return himself, and so had not yet received his refund. *Id.* at 23a, 57a-60a. Appling assured Lamar, however, that he still expected to receive an amount sufficient to cover all of his mounting legal fees. *Id.* at 22a. Once again, Lamar continued its representation of Appling on the basis of his assurances. *Id.* at 41a, 61a-62a.

Lamar and Gordon continued to represent Appling for approximately a year following the initial March meeting, eventually negotiating a settlement that drastically lowered Appling's remaining financial obligations to the former owners of his business, but generating additional legal fees as a result of their efforts. *Id.* at 48a-49a.

Appling's representations about his tax return were false. In June 2005, Appling did sign and submit an amended tax return. *Id.* at 22a, 48a. But that return sought a refund of only $60,718 (which was further reduced by the IRS to $59,851), not the approximately $100,000 he had represented. *Id.* Moreover, Appling received the refund in October 2005—prior to the November meeting when he claimed to have not yet received it. *Id.* at 22a, 48a-49a. And, contrary to his stated intent, Appling never paid any of the refund

money he did receive to Lamar or Gordon, but instead used it to pay other business expenses. *Id.*

When Lamar learned the truth in June 2006 that Appling had received the refund and invested it in his business, rather than paying his outstanding legal fees, Lamar demanded payment of all outstanding fees within 14 days. *Id.* at 23a. When Appling failed to satisfy Lamar's demand, Lamar sued Appling in Georgia state court, obtaining a judgment in the amount of $104,179.60 in October 2012. *Id.* Three months later, Appling and his wife filed for bankruptcy under Chapter 7, seeking to discharge all of their personal debts, including Lamar's judgment. *Id.*

B. Procedural History

1. Lamar initiated an adversary proceeding in the bankruptcy court for the Middle District of Georgia, seeking a determination that Appling's debt to Lamar was not dischargeable under 11 U.S.C. § 523(a)(2)(A) because it was obtained by fraud. Appling moved to dismiss the complaint, arguing among other things that the prohibition on discharging such debts did not apply because the alleged false statements about his tax refund were "statement[s] respecting [his] . . . financial condition." App. 70a (quoting § 523(a)(2)(A)).

In September 2013, the bankruptcy court denied Appling's motion. *Id.* at 67a-81a. "Two views have emerged on the proper interpretation of the phrase 'respecting the debtor's . . . financial condition,'" the court explained. *Id.* at 71a (citation omitted). Under the one view, the phrase includes "any communication that has a bearing on the debtor's financial position," including statements about a "single asset or liability." *Id.* (citation omitted). Under the other, the phrase

includes only "communications that purport to state the debtor's overall net worth, overall financial health, or equation of assets and liabilities." *Id.* (citation omitted). Adopting the latter view, the court held that the alleged misrepresentations about "a single asset, the tax refund," were not representations as to his "overall financial condition or net worth," and therefore refused to dismiss Lamar's complaint. *Id.* at 73a, 76a.

2. Following a two-day trial, the bankruptcy court issued its findings of fact and conclusions of law resolving the adversarial proceeding. *Id.* at 45a-66a. Among other things, the court found that Appling had indeed "knowingly made a false representation with intent to deceive when he represented" that his tax refund would be "approximately $100,000" and, later, that "he had not yet received the refund." *Id.* at 54a, 58a. The court further found that Lamar relied on Appling's representations regarding the tax refund, that it was justified in so doing, and that it was harmed thereby. *Id.* at 62a-66a. Accordingly, it held that Lamar's claim against Appling is not dischargeable under Section 523(a)(2)(A). *Id.* at 66a.

3. On appeal, the district court affirmed the bankruptcy court in all respects. *Id.* at 20a-44a. As to the meaning of Section 523(a)(2)(A), the district court recognized that "[c]ourts disagree whether to construe the phrase 'respecting the debtor's ... financial condition' broadly or strictly," and then canvassed the conflict in courts across the country. *Id.* at 25a-27a. "Finding the reasoning of the Fifth Circuit persuasive," the district court agreed with the bankruptcy court's interpretation and thus concluded that "[a] statement pertaining to a single asset is not a statement of financial condition." *Id.* at 27a-29a.

Because Appling's false statements concerned a "single asset" rather than his "financial condition" (i.e., his "net worth, overall financial heath, or equation of assets and liabilities"), the court affirmed. *Id.* at 30a.

4. The court of appeals reversed and remanded. *Id.* at 1a-19a. Like the courts before it, the court of appeals recognized that "[t]his appeal presents a question that has divided the federal courts"—namely, "Can a statement about a single asset be a 'statement respecting the debtor's . . . financial condition.'" *Id.* at 1a-2a (citation omitted). The court noted that the Fourth Circuit and several bankruptcy courts had held that "a debtor's assertion that he owns certain property free and clear of other liens" or similar statements *are* "statement[s] respecting his financial condition," the court observed. *Id.* at 6a (citation omitted). On the other hand, the court observed, the Fifth, Eighth, and Tenth Circuits, as well as several other bankruptcy courts, have held that "a statement about a single asset *does not* respect a debtor's financial condition." *Id.* at 6a-7a (emphasis added).

The court of appeals sided with the Fourth Circuit's interpretation of Section 523(a)(2)(A). "Whether by its ordinary meaning or as a term of art [in the Bankruptcy Code]," the court conceded, "'financial condition' likely refers to the sum of all assets and liabilities," or "one's overall financial status." *Id.* at 7a-8a. But even so, the court continued, "it does not follow that the phrase 'statement *respecting* the debtor's . . . financial condition' covers only statements that encompass the entirety of a debtor's financial condition at once." *Id.* at 8a (citation omitted). The term "respecting" is "defined broadly," the court said,

pointing to the *Webster's New International Dictionary* definition of the word. *Id.*

The court rejected Lamar's argument that such an interpretation of the phrase was inconsistent with the provision's targeted objective—as reflected in the legislative history—of preventing fraud while protecting debtors from creditors who sought to mislead debtors into submitting false or misleading financial statements, such as an application for credit, for the very purpose of insulating the creditors' claims from discharge. *See Field v. Mans*, 516 U.S. 59, 76-77 (1995). If Congress wanted to limit the provision to such "financial statements," the court of appeals observed, Congress could have said so. App. 10a. Because it did not, the court concluded that by "statement" Congress meant only to distinguish a debt obtained by an affirmative misstatement from one obtained by "a nonactionable omission." *Id.* at 11a.

In the end, the court of appeals concluded that the "text is not ambiguous." *Id.* at 12a. "[A] statement about a single asset can be a 'statement respecting the debtor's . . . financial condition.'" *Id.* at 14a. And, because Appling's statement did not meet all the requirements for nondischargeability in Section 523(a)(2)(B)—namely, the requirement that the false statement be in writing—the court held that Appling's liability to Lamar based on a fraudulent statement "can be discharged." *Id.* The court therefore reversed the bankruptcy court's and district court's ruling that "Appling's debt to Lamar is nondischargeable" and remanded. *Id.*

Judge Rosenbaum concurred, but disagreed with the panel's conclusion that the text was clear-cut. *Id.* at 14a-19a. Contrary to what "the panel seems to

think," she explained, "[s]tanding alone" "the words of the phrase 'statement respecting ... the debtor's financial condition' are *not* unambiguous." *Id.* at 15a (emphasis added). Indeed, as she noted, several other courts, including this Court and "[t]hree other circuits," "have understood the phrase to mean the opposite of what we conclude today." *Id.* at 15a-16a (citing *Field*). Nevertheless, based on her view of whether false statements were more likely to be made orally or in writing, she concluded that a "broad" interpretation was more consistent with Congress's intent. *Id.* at 19a.

REASONS FOR GRANTING THE WRIT

All the core criteria for certiorari are met. In its decision below, the Eleventh Circuit expressly recognized that it was deepening an existing circuit conflict on whether a false statement about a single asset can be a "statement respecting a debtor's ... financial condition," within the meaning of 11 U.S.C. § 523(a)(2)(A). Five Circuits have now decided that question. Three have held that a statement about a single asset is *not* a statement respecting a debtor's financial condition, while two others (including the Eleventh Circuit below) have held that it can be. The issue arises in bankruptcy courts across the country with remarkably frequency and is important to debtors and creditors alike. This case presents a clean vehicle for resolving this question. Moreover, the decision below is wrong and should not be allowed to stand. The petition for a writ of certiorari should be granted.

A. The Decision Below Deepens An Acknowledged Circuit Conflict

The circuit conflict presented by this case is as clear as can be. The Eleventh Circuit expressly recognized

that its decision deepens an existing conflict among the courts of appeals on whether a false statement about a specific asset can be a "statement respecting the debtor's . . . financial condition" within the meaning of 11 U.S.C. § 523(a)(2)(A). App. 6a-7a. Several other courts of appeals have recognized this conflict. *See, e.g.*, *In re Bandi*, 683 F.3d 671, 677 (5th Cir. 2012), *cert. denied*, 133 S. Ct. 845 (2013); *In re Joelson*, 427 F.3d 700, 710 (10th Cir. 2005), *cert. denied*, 547 U.S. 1163 (2006); *In re Lauer*, 371 F.3d 406, 413 (8th Cir. 2004). So has the leading bankruptcy treatise. *See* 4 Alan N. Resnick, Collier on Bankruptcy ¶ 523.08[2][c] (16th ed. 2017 online) ("Courts are sharply divided on the proper scope of the term."). And, indeed, so has Appling himself. *See* Appling CA11 Reply Br. 10 ("This case requires the Court to wade into an active circuit split."). Certiorari is warranted to resolve that conflict.

The majority position. Three courts of appeals have squarely held that a statement about a specific asset is not a "statement respecting the debtor's . . . financial condition." *See* App. 6a-7a.

The Eighth Circuit led the way in *In re Lauer*, 371 F.3d 406 (2004). The false statement in that case concerned a Missouri limited partnership's purported ownership interest in a nursing home. *Id.* at 409-10. The Eighth Circuit initially acknowledged that lower "[c]ourts ha[d] disagreed" on whether the phrase "respecting the debtor's or an insider's financial condition" in 11 U.S.C. § 523(a)(2) could include "misrepresentations concerning specific assets" like the false statement at issue in that case. *Id.* at 413. Then the Eighth Circuit held it did not. *Id.* at 413-14.

In Section 523(a)(2)(A) and (B), the Eighth Circuit reasoned, Congress had sought to address "'the

peculiar potential of financial statements to be misused . . . by creditors' such as 'consumer finance companies, which sometimes have encouraged [false financial statements] by their borrowers for the very purpose of insulating their own claims from discharge.'" *Id.* at 413 (second alteration in original) (citation omitted). Because the false statement about Crossroads' interest in a specific asset (the nursing home) was not analogous to the "financial statements" "routinely required" by such creditors, the Eighth Circuit held that it was not a statement "respecting [Crossroads'] financial condition," and therefore the debtor's fraud liability was nondischargeable. *Id.* at 413-14.[2]

A year later, the Tenth Circuit considered the issue in *In re Joelson*, 427 F.3d 700 (2005). There, the debtor made false statements about specific real properties in order to secure a $50,000 loan. *Id.* at 703. Like the Eighth Circuit, the Tenth Circuit recognized at the outset that "[c]ases interpreting the phrase 'respecting the debtor's . . . financial condition' have split." *Id.* at 710. Under what the court of appeals called the "strict interpretation," statements "respecting the debtor's . . .

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[2] In *Lauer*, the debtor misrepresented the limited partnership Crossroads' interest in the nursing home, not his own. "The Bankruptcy Code defines 'insider' to include a partnership in which an individual debtor is a general partner." 371 F.3d at 413. Accordingly, the Eighth Circuit considered whether the misrepresentation about Crossroad's interest was a "statement respecting . . . an insider's financial condition," instead of a "debtor's . . . financial condition." *Id.* The court gave no indication that the distinction made any difference to its analysis, and no other court of appeals has distinguished *Lauer* on that basis. *See* App. 6a-7a (including the Eighth Circuit among the courts of appeals to have held that "a statement about a single asset does not respect a *debtor's* financial condition" (emphasis added)).

financial condition" are only those that "present[] an overall picture of the debtor's financial position." *Id.* at 705. By contrast, the court noted, under the "broad interpretation" even a communication "addressing the status of a single asset or liability qualifies." *Id.*

After extensive analysis of the text, structure, and policy of the Bankruptcy Code, *id.* at 706-07; the legislative history of Section 523(a)(2), *id.* at 707-10; and case law from this Court and others interpreting the provision, *id.* at 710-14, the Tenth Circuit agreed with the former interpretation. *Id.* at 714. Accordingly, the court held that statements "respecting the debtor's ... financial condition" are "those that purport to present a picture of the debtor's overall financial health." *Id.* The debtor's false statements concerning only her purported ownership of "certain assets" were not. *Id.* at 714-15.

The Fifth Circuit next addressed the issue in *In re Bandi*, 683 F.3d 671 (2012). The false statements again concerned the debtor's (or, in that case, debtors') purported ownership of certain real properties in order to secure a loan. *Id.* at 673. The Fifth Circuit likewise acknowledged that "there is a split among the various courts as to the correct interpretation of § 523(a)(2)." *Id.* at 677. After carefully examining the text and other indicia of Congress's intent, the Fifth Circuit sided with the Tenth and Eighth Circuits: "We conclude that the phrase 'a statement respecting the debtor's or an insider's financial condition' as used in § 523(a)(2) was meant to embody terms commonly understood in commercial usage rather than a broadly descriptive phrase intended to capture any and all misrepresentations that pertain in some way to specific assets or liabilities of the debtor." *Id.* at 676. As such,

the debtors' false statements about specific properties were not "respecting [their] financial condition," and thus the debt was nondischargeable. *Id.* at 679.[3]

The minority view. Before the Eleventh Circuit's decision in this case, the Fourth Circuit was the only court of appeals to have reached a contrary conclusion, and the Fourth Circuit did so more than three decades ago, in a one-page decision. *See* App. 6a.

In *Engler v. Van Steinburg*, the debtor made a false statement that certain collateral was not subject to a superior lien in order to obtain a loan. 744 F.2d 1060, 1060 (1984). The Fourth Circuit"[c]onceded[]" that "a statement that one's assets are not encumbered is not a formal financial statement." *Id.* at 1060-61. But, it held, Section 523(a)(2)(A) did not "speak in terms of financial statements." *Id.* It referred instead to "a much broader class of statements—those 'respecting the debtor's . . . financial condition.'" *Id.* at 1061. An assertion that one owns a certain property "free and clear," it reasoned, "may be the most significant information about his financial condition." *Id.* And, thus, a debt incurred on that basis could be discharged, unless it met the higher standards for nondischargeability in 11 U.S.C. § 523(a)(2)(B). *Id.* at 1060-61. Because the statement at issue did not meet those standards—namely, it was not made in writing—the court held that it could be discharged. *Id.* at 1060.

As the first court of appeals to address the question, the Fourth Circuit's analysis was brief. Unlike all of the courts of appeals to address the issue since, the Fourth Circuit did not recognize that courts

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[3] As discussed *infra* at 14-15, the debtors petitioned this Court for certiorari in *Baudi*. This Court denied review.

had adopted conflicting interpretations of Section 523(a)(2)(A). The court also failed to consider whether its interpretation was consistent with the purpose of the provision—as reflected in the legislative history and described in *Field*, *see supra* at 3 & n.1—or with the policies behind the Bankruptcy Code as a whole.

For that reason, the last time certiorari was sought on the question presented—in 2012, following the Fifth Circuit's decision in *Bandi*—the respondent argued that the split did not merit review because it was "stale" (given that it was based on 1984 decision), "lopsided" (given that the line up, then, was 3-1), and thin (given that the Fourth Circuit's analysis of the issue was brief). *In re Bandi* Opp. at 5-7, 2012 WL 6019371. The respondent also pointed to the "emerging consensus" among the courts of appeals, and speculated that the Fourth Circuit might eventually revisit the issue and restore uniformity to the law. *Id.* at 7.

Whether or not that was a fair assessment then, it is certainly not now. By acknowledging the conflict among the courts of appeals and siding with the Fourth Circuit in an extensively reasoned (even if ultimately erroneous) published decision, the Eleventh Circuit has eliminated any element of staleness, any realistic chance that the conflict would sort itself out on its own, and any argument that the conflict is not fully vetted, thus necessitating the intervention of this Court to restore uniformity among the circuits on this important issue. The question presented is ripe for review.

B. The Question Presented Is Important And This Case Presents An Excellent Vehicle

The clear and deepening split over the question presented is a compelling, and frequently sufficient,

basis to grant certiorari in itself. But the case for certiorari here is further bolstered by the fact that the question presented is undeniably important—to countless debtors and creditors, and the bankruptcy system alike. It recurs frequently in bankruptcy courts throughout the country. And this case offers a clean vehicle in which to resolve the conflict.

Ensuring the uniformity of federal law is always important, but it is fundamental to the proper administration of the bankruptcy system in particular. The Constitution itself acknowledges as much by granting Congress power "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl. 4. This Court thus routinely grants certiorari to resolve disagreements between just *two* courts of appeals concerning the interpretation or application of the Bankruptcy Code. *See, e.g.*, *Harris v. Viegelahn*, 135 S. Ct. 1829, 1836 (2015) (certiorari was granted to resolve a 1-1 circuit split); *Clark v. Rameker*, 134 S. Ct. 2242, 2246 (2014) (same); *Hall v. United States*, 132 S. Ct. 1882, 1886 & n.1 (2012) (same). Here, the Eleventh Circuit has deepened a circuit conflict that now involves at least *five* circuits. Such disuniformity in the "uniform Laws" of bankruptcy is untenable.

The untenability of allowing this circuit split to stand is underscored by the fact that the question recurs so frequently in the lower courts. In addition to the five circuits that have now issued published opinions addressing the question, at least two others have been presented with it, but resolved the appeals without adopting a definitive answer. *See In re Gulevsky*, 362 F.3d 961, 962 (7th Cir. 2004); *In re Bogdanovich*, 292 F.3d 104, 112 (2d Cir. 2002).

Perhaps more important, as the Eleventh Circuit noted, the question regularly arises in bankruptcy courts around the country, where the answers are similarly inconsistent. *Compare, e.g., In re Feldman*, 500 B.R. 431, 437 (Bankr. E.D. Pa. 2013) (adopting majority position); *In re Banayan*, 468 B.R. 542, 575-76 (Bankr. N.D.N.Y. 2012) (same); *In re Campbell*, 448 B.R. 876, 886 (Bankr. W.D. Pa. 2011) (same),[4] *with In re Carless*, No. 10-42988 (DHS), 2012 WL 32700, at *3-4 (Bankr. D.N.J. Jan. 6, 2012) (adopting the minority position); *In re Aman*, 492 B.R. 550, 565 & n.47 (Bankr. M.D. Fla. 2010) (same); *In re Nicolai*, No. 05-29876, 2007 WL 405851, at *1 (Bankr. D.N.J. Jan. 31, 2007) (same).[5] The citations here represent just the tip of

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[4] *See also In re Alicea*, 230 B.R. 492, 503-04 (Bankr. S.D.N.Y. 1999) (majority position); *In re Soderlund*, 197 B.R. 742, 746 (Bankr. D. Mass. 1996) (same); *In re Peterson*, 182 B.R. 877, 880 (Bankr. N.D. Okla. 1995) (same); *In re Olinger*, 160 B.R. 1004, 1010–11 (Bankr. S.D. Ind. 1993) (same); *In re Oliver*, 145 B.R. 303, 305-06 (Bankr. E.D. Mo. 1992) (same); *In re Mercado*, 144 B.R. 879, 883-85 (Bankr. C.D. Cal. 1992) (same); *In re Sansoucy*, 136 B.R. 20, 23 (Bankr. D.N.H. 1992) (same); *In re Price*, 123 B.R. 42, 45 (Bankr. N.D. Ill. 1991) (same); *In re Seaborne*, 106 B.R. 711, 714 (Bankr. M.D. Fla. 1989) (same); *In re Pollina*, 31 B.R. 975, 977-78 (D.N.J. 1983) (same).

[5] *See also In re Hambley*, 329 B.R. 382, 399 (Bankr. E.D.N.Y. 2005) (minority position); *In re Priestley*, 201 B.R. 875, 882 (Bankr. D. Del. 1996) (same); *In re Kolbfleisch*, 97 B.R. 351, 353 (Bankr. N.D. Ohio 1989) (same); *In re Richey*, 103 B.R. 25, 29 (Bankr. D. Conn. 1989) (same); *In re Rhodes*, 93 B.R. 622, 624 (Bankr. S.D. Ill. 1988) (same); *In re Howard*, 73 B.R. 694, 702 (Bankr. N.D. Ind. 1987) (same); *In re Panaia*, 61 B.R. 959, 960-61 (Bankr. D. Mass. 1986) (same); *In re Prestridge*, 45 B.R. 681, 683 (Bankr. W.D. Tenn. 1985) (same).

the iceberg given that many if not most bankruptcy court rulings on the issue are oral and unreported.

This case presents the ideal vehicle for resolving the conflict. The relevant facts are undisputed (or have been resolved by a finder or fact), and the resolution of the question presented is dispositive of the dischargeability of the debt. After a two-day trial, the bankruptcy court found that every other element of nondischargeability under Section 523(a)(2)(A) was met. App. 62a-66a. Its findings were affirmed by the district court, *see id.* at 30a-44a, and left untouched by the court of appeals, *see id.* at 4a. Appling himself acknowledged that the "case require[d] the court to wade into an active circuit split." Appling CA11 Reply Br. 10. The question presented was raised and passed upon by each court below—the bankruptcy court (App. 70a-76a), district court (*id.* at 24a-30a), and court of appeals (*id.* at 4a-14a). The court of appeals passed upon the question in a published opinion after thorough analysis, and chose a side. There is no impediment to this Court's resolving the question in this case, and therefore no reason to wait to decide this issue.

C. The Decision Below Is Wrong

Finally, the case for certiorari is strengthened by the fact that the court of appeals erred. The court of appeals thought the text of Section 523(a)(2)(A) unambiguously compelled its conclusion, despite the contrary holdings from three courts of appeals and myriad bankruptcy courts. That was error. The text and structure of the statute, as well as the purpose of Section 523(a)(2)(A) and the origins of the "financial condition" exception in particular, weigh decisively against the Eleventh Circuit's conclusion.

Most fundamentally, the Eleventh Circuit's interpretation fails to give effect to the text of Section 523(a)(2)(A). "Financial condition" is different than "finances" generally. When the Bankruptcy Code uses the term "financial condition," it refers to the debtor's financial health generally—*i.e.*, the balance of all of the debtor's assets and liabilities. The Code defines "insolvent"—the lynchpin of the bankruptcy system—as, among other things, the "*financial condition* such that the sum of such entity's debts is greater than all of such entity's property." 11 U.S.C. § 101(32)(A) (emphasis added). This meaning is also consistent with both the ordinary and commercial usage of "financial condition." *See, e.g.*, *Balance sheet*, Webster's Third New International Dictionary 165 (1993) (defining "balance sheet" as a "statement of the *financial condition* (as of a corporation) at a given date showing the equality of total assets to total liabilities plus net worth or of total liabilities to total assets plus deficit" (emphasis added)); *In re Bandi*, 683 F.3d at 676.

Accordingly, before the court of appeals, Appling "accept[ed] the premise that 'financial condition'" in Section 523(a)(2)(A) means "*overall* financial condition." Appling CA11 Br. 16. The court of appeals did the same. *See* App. 8a ("Whether by its ordinary meaning or as a term of art, 'financial condition' likely refers to the sum of all assets and liabilities."); *see id.* at 9a ("statement *of* the debtor's financial condition" would likely include only those statements that "express[] a debtor's overall financial condition").

Instead, the Eleventh Circuit focused on Congress's use of "respecting." In the court of appeals' view, "statement[s] *respecting* the debtor's ... financial condition" must include statements concerning a single

asset because the word "respecting" is "defined broadly as '[w]ith regard or relation to; regarding; concerning.'" App. 8a (quoting *Respecting*, Webster's New International Dictionary 2123 (2d ed. 1961)). That interpretation uses the word "respecting" to effectively override or change the meaning of "financial condition."

Of course, "financial condition" has to be considered in context. And it is no doubt true that "respecting," like the similar "related to" or "in connection with" phrases Congress uses from time to time, has breadth in the abstract. Indeed, this Court has observed that such phrases are "essentially 'indeterminat[e].'" *Maracich v. Spears*, 133 S. Ct. 2191, 2200 (2013) (alteration in original) (citation omitted). As such, "one might be excused for wondering, at first blush," when Congress uses them, "whether [its] words of limitation . . . do much limiting" at all. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995). But, for that very reason, the Court has cautioned against interpreting such phrases "to extend to the furthest stretch of its indeterminacy." *Id.*

That is precisely what the Eleventh Circuit has done here. While (as discussed) "financial condition" is a phrase of unquestioned limitation, under the Eleventh Circuit's interpretation the exception in Section 523(a)(2)(A) essentially applies to any statement about anything concerning one's finances—a vastly broader class. The court's reading of "respecting" thus renders Congress's use of "financial condition" largely meaningless. If Congress had meant that result, the far more natural way to achieve it would have been to say a "statement respecting the debtor's finances" or the like—not "financial condition."

Moreover, this interpretation was not necessary. A court can give effect to Congress's use of "respecting" without overriding the limitations inherent in Congress's use of "financial condition."

The Eleventh Circuit's interpretation is also irreconcilable with the purpose of Section 523(a)(2)(A) as a whole. Section 523(a)(2)(A) is a prohibition on the discharge of debts incurred by fraudulent means, dating back in one form or another to at least the Bankruptcy Act of 1898. *See Husky Int'l Elecs., Inc. v. Ritz*, 136 S. Ct. 1581, 1585 (2016); *In re Joelson*, 427 F.3d at 707. It gives effect to the fundamental bankruptcy policy that the bankruptcy courts will not provide safe haven for the perpetrators of fraud. As this Court has stressed, the Code seeks to protect the "honest but unfortunate debtor." *Cohen v. de la Cruz*, 523 U.S. 213, 217 (1998) (citation omitted).

The "financial condition" exception carves out of that longstanding prohibition debts obtained by a particular kind of fraud, based on "statements respecting the debtor's . . . financial condition." As this Court has repeatedly recognized, "[i]n construing provisions . . . in which a general statement of policy is qualified by an exception," the Court's typical practice is "[to] read the exception narrowly in order to preserve the primary operation of the provision." *Knight v. Commissioner*, 552 U.S. 181, 190 (2008) (alterations in original) (citation omitted). The Eleventh Circuit's interpretation, by contrast, undermines the primary operation of Section 523(a)(2)(A) by creating a loophole through which dishonest debtors might relieve themselves, at honest creditors' expense, of liabilities incurred through fraud.

As the Tenth Circuit observed, the minority view of the "financial condition" exception could "eliminate coverage for many misrepresentations" at the very "heart" of Section 523(a)(2)(A), because "'virtually every statement by a debtor that induces the delivery of goods or services on credit relates to his ability to pay.'" *In re Joelson*, 427 F.3d at 710, 713 (citation omitted). Even the most ardent textualists would endeavor to avoid that problematic result. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 63-65 (2012) ("A textually permissible interpretation that furthers rather than obstructs a document's purpose should be favored.").

Finally, the Eleventh Circuit's interpretation also fails to account for the genesis of the "financial condition" exception. As this Court recognized in *Field*, Congress added the "financial condition" exception because it was concerned that certain consumer-finance companies were deliberately encouraging their customers to "submit[] false financial statements . . . for the very purpose of insulating [the creditors'] own claims from discharge." 516 U.S. at 76-77. These creditors accomplished this by misleading loan applicants into making inaccurate statements about their "complete list of debts." *Id.* at 77 n.13 (quoting H.R. Rep. No. 95-595 at 130 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6091). Thus, Congress crafted an exception for debts arising from "statement[s] respecting the debtor's financial condition," while heightening the rules for discharging such a debt to protect against the problem it was addressing. *See id.* at 65.

The Eleventh Circuit's decision expands the scope of the "financial condition" exception far beyond the

particular problem targeted by Congress when it amended the provision. Indeed, it turns Congress's intent on its head. If a statement "respecting the debtor's ... financial condition" includes a statement regarding a single asset, then in an effort to protect the honest but unwary debtor from dishonest creditors, Congress has in fact made a huge category of debts incurred by fraud dischargeable in bankruptcy *unless* the honest creditor can meet the heightened standards of Section 523(a)(2)(B), including among others proving that the statement be in writing and that the creditor reasonably (as opposed to justifiably) relied on it.

The Eleventh Circuit erred in concluding that the "financial condition" exception contained in Section 523(a)(2)(A) demands these strange results, much less *unambiguously* demands these results. The flaws in the Eleventh Circuit's interpretation provide all the more reason for this Court to grant review.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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April 11, 2017

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IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 16-11911

D.C. Docket Nos. 3:15-cv-00031-CAR;
3:13-bkc-03042-JPS

In re: R. SCOTT APPLING,

Debtor.

R. SCOTT APPLING,

Plaintiff - Appellant,

versus

LAMAR, ARCHER & COFRIN, LLP,

Defendant - Appellee.

Appeal from the United States District Court
for the Middle District of Georgia

(February 15, 2017)
848 F.3d 953

Opinion

Before WILLIAM PRYOR and ROSENBAUM, Circuit Judges, and MARTINEZ,* District Judge.

WILLIAM PRYOR, Circuit Judge:

This appeal presents a question that has divided the federal courts: Can a statement about a single asset be

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* Honorable Jose E. Martinez, United States District Judge for the Southern District of Florida, sitting by designation.

a "statement respecting the debtor's ... financial condition"? 11 U.S.C. § 523(a)(2). Ordinarily, a debtor cannot discharge any debt incurred by fraud, *id.* § 523(a)(2)(A), but a debtor can discharge a debt incurred by a false statement respecting his financial condition unless that statement is in writing, *id.* § 523(a)(2)(B). R. Scott Appling made false oral statements to his lawyers, Lamar, Archer & Cofrin, LLP, that he expected a large tax refund that he would use to pay his debt to the firm. After Lamar obtained a judgment against Appling for the debt, Appling filed for bankruptcy and Lamar initiated an adversary proceeding to have the debt ruled nondischargeable. The bankruptcy court and the district court ruled that Appling's debt could not be discharged under section 523(a)(2)(A) because it was incurred by fraud. But we disagree. Because Appling's statements about his tax refund "respect[] [his] ... financial condition," *id.* § 523(a)(2)(B)(ii), and were not in writing, *id.* § 523(a)(2)(B), his debt to Lamar can be discharged in bankruptcy. We reverse and remand.

I. BACKGROUND

R. Scott Appling hired the law firm Lamar, Archer & Cofrin, LLP, to represent him in litigation against the former owners of his new business. Appling agreed to pay Lamar on an hourly basis with invoices for fees and costs due monthly. Appling became unable to keep current on the mounting legal bill and as of March 2005, owed Lamar $60,819.97. Lamar threatened to terminate the firm's representation and place an attorney's lien on all work product unless Appling paid the outstanding fees.

Appling and his attorneys held a meeting in March 2005. The bankruptcy court found that during this

meeting Appling stated he was expecting a tax refund of "approximately $100,000," which would be enough to pay current and future fees. Lamar contends that in reliance on this statement, it continued its representation and did not begin collection of its overdue fees.

When Appling and his wife submitted their tax return, they requested a refund of only $60,718 and received a refund of $59,851 in October. The Applings spent this money on their business. They did not pay Lamar.

Appling and his attorneys met again in November 2005. The bankruptcy court found that Appling stated he had not yet received the refund. Lamar contends that in reliance on this statement, it agreed to complete the pending litigation and forego immediate collection of its fees but refused to undertake any additional representation. In March 2006, Lamar sent Appling his final invoice for a principal amount due of $55,303.66 and $6,185.32 in interest.

Five years later, Lamar filed suit against Appling in a superior court in Georgia. In October 2012, Lamar obtained a judgment for $104,179.60. Three months later, the Applings filed for bankruptcy.

Lamar initiated an adversary proceeding against Appling in bankruptcy court. The bankruptcy court ruled that because Appling made fraudulent statements on which Lamar justifiably relied, Appling's debt to Lamar was nondischargeable, 11 U.S.C. § 523(a)(2)(A). The district court affirmed. The district court rejected Appling's argument that his oral statements "respect[ed] . . . [his] financial condition," 11 U.S.C. § 523(a)(2)(B), and should have been dischargeable. The district court ruled that

"statements respecting the debtor's financial condition involve the debtor's net worth, overall financial health, or equation of assets and liabilities. A statement pertaining to a single asset is not a statement of financial condition." The district court agreed with the bankruptcy court that Appling made material false statements with the intent to deceive on which Lamar justifiably relied.

II. STANDARD OF REVIEW

When we sit as the second appellate court to review a bankruptcy case, *In re Glados, Inc.*, 83 F.3d 1360, 1362 (11th Cir. 1996), we "assess the bankruptcy court's judgment anew, employing the same standard of review the district court itself used," *In re Globe Mfg. Corp.*, 567 F.3d 1291, 1296 (11th Cir. 2009). "Thus, we review the bankruptcy court's factual findings for clear error, and its legal conclusions *de novo*." *Id.*

III. DISCUSSION

The Bankruptcy Code gives a debtor a fresh start by permitting him to discharge his pre-existing debts. But there are many exceptions to discharge. And some of those exceptions protect victims of fraud.

Section 523(a)(2) creates two mutually exclusive exceptions to discharge:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—
>
> . . .
>
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—

> (A) false pretenses, a false representation, or actual fraud, *other than a statement respecting the debtor's or an insider's financial condition*;
>
> (B) use of a *statement in writing*—
>
> (i) that is materially false;
>
> (ii) *respecting the debtor's or an insider's financial condition*;
>
> (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and
>
> (iv) that the debtor caused to be made or published with intent to deceive; . . .

11 U.S.C. § 523(a)(2) (emphasis added).

The Code treats debts incurred by a statement "respecting the debtor's ... financial condition" differently from other debts. *Id.* All fraud "other than a statement respecting the debtor's ... financial condition" is covered by subsection (A). *Id.* § 523(a)(2)(A). Under subsection (A), a debtor cannot discharge a debt obtained by any type of fraudulent statement, oral or written. *Id.* A creditor also need prove only justifiable reliance. *Field v. Mans*, 516 U.S. 59, 61 (1995). But if a statement is made "respecting the debtor's . . . financial condition," then subsection (B) governs. 11 U.S.C. § 523(a)(2)(B)(ii). To avoid discharge of a debt induced by a statement respecting the debtor's financial condition, a creditor must show reasonable reliance and that the statement was intentional, materially false, and in writing. *Id.* § 523(a)(2)(B). Thus, a debt incurred by an oral, fraudulent statement respecting the debtor's financial condition can be discharged in bankruptcy.

We must determine whether Appling's statements about a single asset are "statement[s] respecting [his] ... financial condition." *Id.* § 523(a)(2). The bankruptcy court found that Appling made false oral statements about his anticipated tax refund to receive an extension of credit from Lamar. If these statements *do not* respect his financial condition, Appling can discharge his debt to Lamar in bankruptcy only if he disproves an element of fraud. *Id.* § 523(a)(2)(A). But if the statements *do* respect his financial condition, Appling can discharge his debt to Lamar because the statements were not in writing. *Id.* § 523(a)(2)(B).

The circuits and other federal courts are split on this question. The Fourth Circuit has held that a "debtor's assertion that he owns certain property free and clear of other liens is a statement respecting his financial condition." *Engler v. Van Steinburg*, 744 F.2d 1060, 1061 (4th Cir. 1984). Several bankruptcy courts—including one in this Circuit, *In re Aman*, 492 B.R. 550, 565 & n.47 (Bankr. M.D. Fla. 2010)—have agreed. *See, e.g.*, *In re Carless*, No. 10–42988, slip op. at *3–4 (Bankr. D.N.J. Jan. 6, 2012); *In re Nicolai*, No. 05–29876, slip op. at *1 (Bankr. D.N.J. Jan. 31, 2007); *In re Hambley*, 329 B.R. 382, 399 (Bankr. E.D.N.Y. 2005); *In re Priestley*, 201 B.R. 875, 882 (Bankr. D. Del. 1996); *In re Kolbfleisch*, 97 B.R. 351, 353 (Bankr. N.D. Ohio 1989); *Matter of Richey*, 103 B.R. 25, 29 (Bankr. D. Conn. 1989); *In re Rhodes*, 93 B.R. 622, 624 (Bankr. S.D. Ill. 1988); *In re Howard*, 73 B.R. 694, 702 (Bankr. N.D. Ind. 1987); *In re Panaia*, 61 B.R. 959, 960–61 (Bankr. D. Mass. 1986); *In re Roeder*, 61 B.R. 179, 181 n.1 (Bankr. W.D. Ky. 1986); *In re Prestridge*, 45 B.R. 681, 683 (Bankr. W.D. Tenn. 1985). But the Fifth, Eighth, and Tenth Circuits have held that a statement

about a single asset does not respect a debtor's financial condition because it "says nothing about the overall financial condition of the person making the representation or the ability to repay debt." *In re Bandi*, 683 F.3d 671, 676 (5th Cir. 2012); *see also In re Lauer*, 371 F.3d 406, 413–14 (8th Cir. 2004); *In re Joelson*, 427 F.3d 700, 706 (10th Cir. 2005). And some bankruptcy courts in other circuits have agreed. *See, e.g.*, *In re Feldman*, 500 B.R. 431, 437 (Bankr. E.D. Penn. 2013); *In re Banayan*, 468 B.R. 542, 575–76 (Bankr. N.D.N.Y. 2012); *In re Campbell*, 448 B.R. 876, 886 (Bankr. W.D. Penn. 2011).

"[I]nterpretation of the Bankruptcy Code starts 'where all such inquiries must begin: with the language of the statute itself.'" *Ransom v. FIA Card Servs. N.A.*, 562 U.S. 61, 69 (2011) (quoting *United States v. Ron Pair Enters, Inc.*, 489 U.S. 235, 241 (1989)). Because the Code does not define the relevant terms, we look to "their ordinary, everyday meanings—unless the context indicates that they bear a technical sense." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 69 (2012); *see also In re Piazza*, 719 F.3d 1253, 1261 (11th Cir. 2013) (applying this canon to the Bankruptcy Code). The text and context establish that a statement about a single asset can be a "statement respecting the debtor's ... financial condition." 11 U.S.C. § 523(a)(2).

"Financial condition" likely means one's overall financial status. Elsewhere in the statute, the Bankruptcy Code defines "insolvent" as the "financial condition such that the sum of such entity's debts is greater than all of such entity's property." *Id.* § 101(32)(A). In this context, the statute uses "financial condition" to describe the overall state of being

insolvent, not any particular asset on its own. Because "[a] word or phrase is presumed to bear the same meaning throughout a text," Scalia & Garner, *supra*, at 170, we should interpret "financial condition" in section 523(a)(2) in the same way. Whether by its ordinary meaning or as a term of art, "financial condition" likely refers to the sum of all assets and liabilities.

But even if "financial condition" means the sum of all assets and liabilities, it does not follow that the phrase "statement *respecting* the debtor's . . . financial condition," *Id.* § 523(a)(2) (emphasis added), covers only statements that encompass the entirety of a debtor's financial condition at once. Read in context, the phrase "statement *respecting* the debtor's . . . financial condition," *id.*, includes a statement about a single asset. We must not read the word "respecting" out of the statute. *See* Scalia & Garner, *supra*, at 174 ("If possible, every word . . . is to be given effect.").

"Respecting" is defined broadly as "[w]ith regard or relation to; regarding; concerning." *Respecting*, *Webster's New International Dictionary* 2123 (2d ed. 1961); *see also Respecting*, *Oxford English Dictionary* (online ed.) ("With respect to; with reference to; as regards."). For example, documents can "relate to" or "concern" someone's health without describing their entire medical history. Articles can "reference" the Constitution without quoting its entire text. Likewise, a statement can "respect" a debtor's "financial condition" without describing the overall financial situation of the debtor. The Supreme Court has interpreted "with respect to" in a statute to mean "direct relation to, or impact on." *Presley v. Etowah Cty. Comm'n*, 502 U.S. 491, 506 (1992). And the Court has interpreted "respecting" in the First Amendment

to include any partial step toward the establishment of religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). A statement about a single asset "relates to" or "impacts" a debtor's overall financial condition. And knowledge of one asset or liability is a partial step toward knowing whether the debtor is solvent or insolvent.

If the statute applied only to statements that expressed a debtor's overall financial condition, Congress could have said so. Lamar argues that "the preposition 'respecting' has no magic, expansive effect in the statute, it is simply a required grammatical device necessary to connect two related terms." Perhaps this argument would have more sway if the statute said "statement *of* the debtor's financial condition." But Congress did not use this language. Congress also did not say "statement indicating" or "revealing" or "disclosing" or "encompassing" the debtor's financial condition, phrases that would connote a full or complete expression of financial condition.

Lamar dismisses the focus on the word "respecting" as "nothing more than a game of semantics," but judges have a responsibility to interpret the whole text. And "[s]ometimes the canon [of ordinary meaning] governs the interpretation of so simple a word as a preposition." Scalia & Garner, *supra*, at 71. A statement about a single asset is still a statement *respecting* a debtor's financial condition.

Lamar argues that because the legislative history often used "financial statement" in place of "statement respecting the debtor's ... financial condition," 11 U.S.C. § 523(a)(2), we should read the statute to apply only to financial statements, but the word "statement" should also be given its ordinary meaning. Mere

proximity of "statement" to "financial condition" is not enough to limit the meaning of the text. "Statement" is defined as "[t]hat which is stated; an embodiment in words of facts or opinions; a narrative; recital; report; account." *Statement*, *Webster's New International Dictionary* 2461 (2d ed. 1961). The definition of financial statement is technical and would exclude a statement about a single asset: "A balance sheet, income statement, or annual report that summarizes an individual's or organization's financial condition on a specified date or for a specified period by reporting assets and liabilities." *Financial Statement*, *Black's Law Dictionary* (10th ed. 2014). Setting aside the problems with legislative history, Lamar's argument works against it. Precisely because "[t]he term 'financial statement' has a strict, established meaning," *Joelson*, 427 F.3d at 709, we should expect the statute to say "financial statement" if it conveys that meaning. But the statute instead says "statement." To limit the definition to only "financial statements," Congress need only say so. *Cf.* 11 U.S.C. § 1125 (using the term "disclosure statement"); *Id.* § 101(49)(A)(xii) ("registration statement").

The surplusage cannon supports our determination that "statement" should be given its ordinary meaning. "If possible, every word and every provision is to be given effect.... None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence." Scalia & Garner, *supra*, at 174; *see also Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). In subsection (B), the statute says "use of a statement in writing." 11 U.S.C. § 523(a)(2)(B). Because a formal financial statement is almost always a written document (it is hard to imagine

an oral recitation of all assets and liabilities), reading the statute to cover only financial statements would render the writing requirement surplusage.

And in the context of a statute about fraud, the ordinary meaning of the word "statement" makes sense. Section 523(a)(2) creates two similar exceptions to discharge for debts incurred by fraud. Subsection (A) references specific common-law torts. *See Field*, 516 U.S. at 69 ("'[F]alse pretenses, a false representation, or actual fraud,' carry the acquired meaning of terms of art. . . . [T]hey imply elements that the common law has defined them to include." (quoting 11 U.S.C. § 523(a)(2)(A))). Subsection (B) enumerates its own elements which are analogous, but not identical to the common law elements. For example, where the common law requires justifiable reliance, section 523(a)(2)(B)(iii) requires reasonable reliance. *Field*, 516 U.S. at 72–75. Similarly, where the common law requires either an affirmative representation or an intentional omission, section 523(a)(2)(B) requires a "statement," as opposed to an omission. True, if Congress wanted to exclude omissions from subsection (B), it could have used the term "representation" and avoided the confusion with the term "financial statement." But Congress would not have said "false representation" without implying the common law term of art. *See Field*, 516 U.S. at 69. Accordingly, "statement" means an expression or embodiment in words, as opposed to a nonactionable omission.

Lamar also argues that the "only way to give Section 523(a)(2)(A) meaning is to interpret it to provide a distinction between oral and written representations," but this argument reveals a fundamental misunderstanding of the statute. Section

523(a)(2)(A) covers most fraud. But section 523(a)(2)(B) covers statements respecting financial conditions. Lamar states that "certain oral misrepresentations must be non-dischargeable." They are. Any debt incurred by an oral misrepresentation that is not "respecting the debtor's financial condition" is nondischargeable under subsection (A). Appling provides a list of examples, including false representations about job qualifications and lies about the purpose and recipient of a payment. The question is how broadly to define the phrase "statement respecting the debtor's ... financial condition," not whether allowing discharge of debts incurred by oral misrepresentations about finances is a good idea. The statute allows the discharge of debts incurred by oral statements so long as they "respect" the debtor's "financial condition." Lamar's argument is based on policy, not statutory structure.

When the language of the statute is clear, we need not look any further. *See Puerto Rico v. Franklin Cal. Tax–Free Tr.*, 136 S. Ct. 1938, 1946 (2016) (When "the statute's language is plain," "that is also where the inquiry should end." (internal quotations omitted)); *United States v. Great Northern Ry. Co.*, 287 U.S. 144, 154 (1932) ("[W]e have not traveled, in our search for the meaning of the lawmakers, beyond the borders of the statute."). A distaste for dishonest debtors does not empower judges to disregard the text of the statute. Because the text is not ambiguous, we hold that "statement[s] respecting the debtor's ... financial condition" may include a statement about a single asset.

This result is also perfectly sensible. The requirement that some statements be made in writing promotes accuracy and predictability in bankruptcy disputes that often take place years after the facts arose. Lamar refers to our interpretation as a "giant fraud loophole." But the requirement of a writing is not at all unusual in the history of the law. From the Statute of Frauds to the Uniform Commercial Code, law sometimes requires that proof be in writing as a prerequisite to a claim for relief. This requirement may seem harsh after the fact, especially in the case of fraud, but it gives creditors an incentive to create writings before the fact, which provide the court with reliable evidence upon which to make a decision. In the context of a debt incurred by fraud, a lender concerned about protecting its rights in bankruptcy can easily require a written statement from the debtor before extending credit. Lamar, a law firm, could have required Appling to put his promise to spend his tax return on their legal fees in writing before continuing to represent him.

This rule strikes a reasonable balance between the "'conflicting interests' of discouraging fraud and of providing the honest but unfortunate debtor a fresh start." *In re Vann*, 67 F.3d 277, 284 (11th Cir. 1995) (quoting *Grogan v. Garner*, 498 U.S. 279, 287 (1991)). The code does not unfairly reward dishonest debtors, but instead imposes different requirements of proof for different kinds of statements. A statement respecting a debtor's financial condition must be in writing, which helps both the honest debtor prove his honesty and the innocent creditor prove a debtor's dishonesty. And providing an incentive for creditors to receive statements in writing may reduce the incidence of

fraud. Because a statement about a single asset can be a "statement respecting the debtor's ... financial condition," and because Appling's statements were not in writing, his debt can be discharged under section 523(a)(2)(B).

IV. CONCLUSION

We **REVERSE** the order ruling that Appling's debt to Lamar is nondischargeable and **REMAND** for further proceedings consistent with this opinion.

ROSENBAUM, Circuit Judge, concurring:

Sometimes things are not as they seem. Today we conclude that the phrase "statement respecting ... the debtor's financial condition" in 11 U.S.C. § 523(a)(2) warrants a broad reading. As a result, Appling, the debtor in this case, will receive a discharge of the debt he incurred by lying about how he would pay for the legal services he dishonestly obtained. That certainly seems to frustrate a "primary purpose" of the Bankruptcy Act to provide relief to only the "honest debtor." *See Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) (citation and internal quotation marks omitted).

But in actuality, the broad reading we give to the phrase "statement respecting ... the debtor's financial condition" better promotes congressional intent to give a fresh start to only the "honest debtor" than does a narrow construction of the same phrase. This is so because the very same phrase appears in both §§ 523(a)(2)(A) and (B), and it must have the same meaning in both subsections. Though a narrow construction of the phrase in subsection (A) seems to further congressional intent to protect only the "honest debtor," a broad interpretation of the phrase in

subsection (B) better comports with congressional intent. And the reality is that a broad construction of the phrase "statement respecting ... the debtor's financial condition" in subsection (B) advances congressional intent to provide relief for only the "honest debtor" more than a narrow interpretation of the same phrase in subsection (A).

Because the words of the phrase alone are ambiguous, we must construe the phrase with an eye towards congressional intent in enacting the Bankruptcy Act. When we do that, it is clear that "statement respecting ... the debtor's financial condition" must have the broad meaning that the panel attributes to it.

I.

There's no getting around it. Standing alone, the words of the phrase "statement respecting ... the debtor's financial condition" are not unambiguous. True, the panel seems to think they are and argues that the words clearly mean any statement about any finance, asset, or liability that the debtor may have. But other courts have concluded that the language "statement respecting ... the debtor's financial condition" refers to only statements about a debtor's overall financial circumstances—which do not include statements about only a single asset or liability.

Among the courts that appear to have understood the phrase to mean the opposite of what we conclude today is the Supreme Court, though the Supreme Court has not expressly addressed the meaning of the language. In *Field v. Mans*, 516 U.S. 59 (1995), the Court held that a creditor need show only justifiable reliance on a fraudulent misrepresentation in order to except the debt incurred as a result of that reliance,

from discharge under § 523(a)(2)(A). In reaching this conclusion, the Supreme Court discussed § 523(a)(2)(A) and (B)'s references to "a statement respecting the debtor's ... financial condition" and conveyed its understanding that the words "financial condition" in § 523(a)(2) are a prohibition on excepting from discharge under both subsections (A) and (B) "debts traceable to ... a materially false *financial statement*," *id.* at 64 (emphasis added), apparently meaning "financial statement" as a term of art referring to a statement of net worth, not a statement about a single asset or liability. So at least at the time it decided *Field*, the Supreme Court appeared to have a different understanding of the phrase "a statement respecting the debtor's ... financial condition" than we embrace today.

To be sure, I do not suggest that *Field*'s discussion of the meaning of "a statement respecting the debtor's ... financial condition" purports to instruct courts on the proper meaning of § 523(a)(2)(A). But the Supreme Court's understanding as conveyed in *Field* demonstrates that the language of the phrase is fairly susceptible of more than one meaning.

Three other circuits have likewise concluded that the phrase "a statement respecting the debtor's ... financial condition" must be construed narrowly, to refer to only those statements about a debtor's overall net worth—though they do not appear to have determined the language of the phrase to have an unambiguous meaning. *See, e.g., In re Bandi*, 683 F.3d 671 (5th Cir. 2012); *In re Lauer*, 371 F.3d 406 (8th Cir. 2004); *In re Joelson*, 427 F.3d 700 (10th Cir. 2005).

But while the language itself of the phrase in question may not be unambiguous, that doesn't mean

that § 523(a)(2) is ambiguous in the overall statutory scheme. When we construe a statute, we must do so not only by looking to the language itself, but also by reference to "the specific context in which that language is used, and the broader context of the statute as a whole." *Yates v. United States*, 125 S. Ct. 1074, 1081-82 (2015) (citation and quotation marks omitted). And when we do that, it is clear that we must give the phrase "a statement respecting the debtor's . . . financial condition" a broad construction.

The Supreme Court has repeatedly emphasized that the Bankruptcy Code "limits the opportunity for a completely unencumbered new beginning to the 'honest but unfortunate debtor.'" *Grogan v. Garner*, 498 U.S. 279, 287 (1991) (quoting *Hunt*, 292 U.S. at 244). For this reason, only honest debtors receive the benefit of the general policy that exceptions to discharge are to be construed strictly against the creditor and liberally in favor of the debtor. *In re St. Laurent*, 991 F.2d 672, 680 (11th Cir. 1991). Indeed, we have said that "the malefic debtor may not hoist the Bankruptcy Code as protection from the full consequences of fraudulent conduct." *Id.* at 680-81.

So to the extent that the language "statement respecting . . . the debtor's financial condition" is fairly and reasonably susceptible of a construction that better furthers congressional intent to protect only the honest debtor, we are obliged to apply that interpretation. When it comes to § 523(a)(2), a broad construction is reasonable and better accomplishes this purpose than a narrow one.

As the panel notes, the phrase "statement respecting . . . the debtor's financial condition" appears in both subsections (A) and (B). We therefore presume

it to have the same meaning in both subsections. *See Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980) ("[W]e cannot accept respondent's position without unreasonably giving the word 'filed' two different meanings in the same section of the statute.").

But though the words have the same meaning in both subsections (A) and (B), they have opposite effects on whether a debtor may discharge a debt for something obtained through the use of a "statement respecting . . . the debtor's financial condition." Under subsection (A), which refers to oral statements, if a statement falls within the meaning of "statement respecting . . . the debtor's financial condition," the debt incurred as a result of that statement is dischargeable. Meanwhile, under subsection (B), which refers to written statements, if a statement comes within the meaning of "statement respecting . . . the debtor's financial condition," the debt incurred as a result of that statement is not dischargeable, provided that the other conditions in subsection (B) are satisfied.

So if the phrase has a broad meaning, more false oral statements will have the effect of exempting a debt incurred as the result of a misrepresentation, from the exception to discharge (meaning that such debts will be discharged), than if we construe the phrase narrowly. But fewer false written statements will result in excusing a debt for a fraudulently obtained asset, service, or loan. And since it seems likely that, at least in arm's length transactions, most significant debts are obtained as the result of written representations about finances, as opposed to oral ones, a broader interpretation of the phrase is less likely to benefit dishonest debtors than a narrow construction of it.

II.

For these reasons, I agree with the panel that we must construe the phrase "statement respecting . . . the debtor's financial condition" broadly. To be sure, doing so has the effect of allowing Appling's debt for legal services, which the bankruptcy court concluded he obtained by lying to Lamar about the tax refund, to be discharged. But in the overall statutory scheme, the broad interpretation better promotes Congress's concern to provide relief to "honest debtors" only.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA ATHENS DIVISION

R. SCOTT APPLING,	:	
Appellant,	:	
v.	:	3:15-CV-031 (CAR)
LAMAR, ARCHER & COFRIN, LLP,	:	
Appellee.	:	
	:	

ORDER ON APPEAL

Before the Court is an appeal from the decision of the United States Bankruptcy Court for the Middle District of Georgia, Athens Division. On appeal, Appellant-Debtor R. Scott Appling contends the Bankruptcy Court erred in concluding that the $104,179.60 owed to Appellant Lamar, Archer & Cofrin, LLP, is nondischargeable in bankruptcy under 11 U.S.C. § 523(a)(2)(A). This Court has considered the record, the briefs filed by both parties, and the relevant case law. For the reasons discussed below, the decision of the Bankruptcy Court is hereby AFFIRMED.

LEGAL STANDARD

The Court has jurisdiction to hear this appeal pursuant to 28 U.S.C. § 158(a). In reviewing the decision of a bankruptcy court, a district court functions as an appellate court.[1] The Court must accept the Bankruptcy Court's findings of fact, unless

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[1] *See Williams v. EMC Mortg. Corp. (In re Williams)*, 216 F.3d 1295, 1296 (11th Cir. 2000) (per curiam).

those facts are clearly erroneous.[2] The Court may not make independent factual findings.[3] Conclusions of law, however, including the Bankruptcy Court's interpretation and application of the United States Bankruptcy Code, are reviewed *de novo*.[4] Thus, this Court owes no deference to the Bankruptcy Court's interpretation of the law or its application of the law to the facts.[5]

BACKGROUND

In 2004, Appellant Appling purchased a business that manufactured seating components. Appellant subsequently learned he had been defrauded in the purchase based on a misrepresentation of the business's financial condition. He hired Appellee Lamar, Archer & Cofrin, LLP to represent him as counsel. They worked for Appellant on an hourly basis with fees due monthly. Appellant also hired Walter Gordon as local counsel. Representing Appellant, Appellee filed suit against the seller and broker of the business in the Superior Court of Franklin County, Georgia.

By March 16, 2005, Appellant owed Appellee $60,819.97 in unpaid legal fees. Additionally, he owed Gordon around $18,000 in legal fees. Appellant emailed Appellee complaining about the status and expenses of

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2 *Id.*

3 *Equitable Life Assurance Soc'y v. Sublett (In re Sublett)*, 895 F.2d 1381, 1384 (11th Cir. 1990).

4 *See Nordberg v. Arab Banking Corp. (In re Chase & Sanborn Corp.)*, 904 F.2d 588, 593 (11th Cir. 1990).

5 *Goerg v. Parungao (In re Goerg)*, 930 F.2d 1563, 1566 (11th Cir. 1991).

the litigation. In response, partner Robert Lamar notified Appellant that failure to bring fees current would cause Appellee to terminate its representation and place an attorney's lien on Appellant's file.[6]

On March 18, Appellant, Appellee, and Gordon met in Gordon's office. Appellee contends at the meeting Appellant stated his accountant, Mike Strickland, had completed his amended tax return, and Appellant would receive a tax refund of $104,000 to $105,000. Because this amount would be sufficient to bring the account current and pay future fees, and because Appellant stated he would use the money for this purpose, Appellee agreed to continue the representation.[7] At trial, the Bankruptcy Court found Appellant did not represent at the March meeting that his accountant had already prepared the tax return. However, the Bankruptcy court did find Appellant represented that he would receive a tax refund of approximately $100,000.

On June 15, Appellant and his wife signed the amended tax return for the year 2002; however, this return only requested a refund of $60,718. On October 6, the I.R.S. informed Appellant he and his wife would receive a refund of $59,851. Within two weeks of receiving the letter from the I.R.S., Appellant and his wife obtained a refund of $59,851. However, Appellant did not use the refund to pay his attorneys.

On November 2, 2005, Appellant and his wife met Appellee in its office for the second time to discuss the unpaid legal fees and status of Appellee's

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6 [Doc. 3] at 43.

7 *Id.* at 17.

representation. Appellant contends he informed Appellee he planned to use the tax refund to keep his floundering business afloat instead of paying Appellee. However, the Bankruptcy Court found Appellant represented to Appellee he had not yet received his refund, and he would use his refund to pay the outstanding legal fees.[8]

In June 2006, a few months after the underlying litigation settled, Appellee learned Appellant had received the refund and used it to prop up his business, not to pay Appellee. In a letter dated June 26, Appellee demanded payment of the outstanding legal fees within fourteen days. On July 19, Appellant responded that after the November 2 meeting, his bankruptcy attorney suggested using the tax refund to help his business instead of paying Appellee, and told Appellee, "[i]t should be obvious as to what I chose to do since we are still open."[9]

In October 2012, after not receiving payment, Appellee sued Appellant in the Superior Court of Hart County, Georgia, and obtained a judgment for $104,179.60. In January 2013, Appellant and his wife filed a petition under Chapter 7 of the Bankruptcy Code. In an adversary proceeding, Appellee sought to have its claim against Appellant rendered nondischargeable under 11 U.S.C. § 523(a)(2)(A). The Bankruptcy Court concluded on March 10, 2015 that Appellant's debt is nondischargeable, and this appeal followed.

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8 *Id.* at 68-69; *see also* [Doc. 1-2] at 14.

9 [Doc. 3] at 73.

ISSUES ON APPEAL

A. Whether the Bankruptcy Court erred in ruling Appellant's alleged representation was not an "oral statement respecting the debtor's financial condition" under 11 U.S.C. § 523(a)(2)(A).

B. Whether the Bankruptcy Court erred in determining Appellee has a nondischargeable claim against Appellant.

C. Whether the Bankruptcy Court erred in failing to apply the heightened standards required under 11 U.S.C. § 523(a)(2)(A) and relevant case law for statements concerning future acts and omissions.

D. Whether the Bankruptcy Court erred in determining Appellee proved reliance, much less justifiable reliance, on any representation of Appellant.

E. Whether the Bankruptcy Court erred in determining damages as being the whole amount of Appellee's claim rather than measuring damages based on the alleged misrepresentation itself.

DISCUSSION

I. Statement Respecting Debtor's Financial Condition

Chapter 7 of the Bankruptcy Code provides for the discharge of certain debts incurred by a debtor, allowing the debtor to obtain a fresh start.[10] However, there are exceptions to discharge, some of which are intended to protect victims of fraud.[11] This appeal's

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[10] *Bandi v. Becnel (In re Bandi)*, 683 F.3d 671, 674 (2012) (citing 11 U.S.C. § 727).

[11] *Id.* (citing 11 U.S.C. § 523).

threshold issue centers around the Bankruptcy Court's interpretation of one of those exceptions, 11 U.S.C. § 523(a)(2)(A).[12]

Pursuant to § 523(a)(2)(A), a debt "for money, property, services, or an extension, renewal, or refinancing of credit" is nondischargeable "to the extent obtained by false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition." Additionally, a false oral statement is sufficient to render a debt nondischargeable under § 523(a)(2)(A).[13] Therefore, under § 523(a)(2)(A), for a false oral statement to be nondischargeable it must not be a statement "respecting the debtor's ... financial condition."[14]

Courts disagree whether to construe the phrase "respecting the debtor's ... financial condition" broadly or strictly.[15] According to the broad interpretation, "any communication that has a bearing on the debtor's

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[12] The sister exception to §523 (a)(2)(A) is § 523(a)(2)(B), which covers a debtor's false "written statement" of her financial condition. *See Generac Power Systems, Inc., v. William A. Dato (In re Dato)*, 410 B.R. 106, 110 (Bankr. S.D. Fla. 2009).

[13] *Ershowsky v. Freedman (In re Freedman)*, 427 F. App'x. 813, 818 (11th Cir. 2011) (per curiam). *See also Butler v. Roberts (In re Roberts)*, 54 B.R. 765, 770 (Bankr. D. N.D. 1985) (noting that subsection "(a)(2)(A) includes any acts or statements including those made orally but *excludes* oral statements respecting the debtor's financial condition") (emphasis in original).

[14] *See Supra* note 13.

[15] *Prim Capital Corp. v. May (In re May)*, 368 B.R. 85, 2007 WL 2052185, at *6 (6th Cir. BAP July 19, 2007) (unpublished decision).

financial position," even if it only pertains to a single asset, qualifies as a statement respecting the debtor's financial condition.[16] Under this interpretation, statements involving "conditions to purchase of an asset, ownership of particular property, indebtedness to a creditor and encumbrances on assets" qualify as statements respecting the debtor's financial condition.[17] In contrast, the strict interpretation limits a statement respecting the debtor's financial condition to "financial-type statements including balance sheets, income statements, statements of changes in financial position, or income and debt statements that provide what may be described as the debtor['s] . . . net worth, overall financial health, or equation of assets and liabilities."[18]

This case turns on whether the Bankruptcy Court properly interpreted the phrase "a statement respecting a debtor's financial condition." Although historically a majority of courts followed the broad interpretation,[19] in recent years, the majority of courts have adopted the strict interpretation.[20] The Eleventh

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16 *Id.*

17 *Skull Valley Band of Goshute Indians v. Chivers (In re Chivers)*, 275 B.R. 606, 614 (Bankr. D. Ut. 2002).

18 *Id.* at 615.

19 *Id.* at 615. *See also Engler v. Van Steinburg (In re Steinburg)*, 744 F.2d 1060 (4th Cir. 1984); *Conn. Nat'l Bank v. Panaia (In re Panaia)*, 61 B.R. 959 (Bankr. D. Mass. 1986); *King v. Prestridge (In re Prestridge)*, 45 B.R. 681 (Bankr. W.D. Tenn. 1985).

20 *In re Chivers*, 275 B.R. at 615. *See also Jokay Co. v. Mercado (In re Mercado)*, 144 B.R. 879, 881-86 (Bankr. C.D. Cal. 1992); *Weiss v. Alicea (In re Alicea)*, 230 B.R. 492, 503 (Bankr.

Circuit, however, has yet to address this issue. Although the Fourth Circuit[21] follows the broad interpretation, the Fifth,[22] Eighth,[23] and Ten Circuits[24] have adopted the strict interpretation. Finding the reasoning of the Fifth Circuit persuasive, this Court finds that the Bankruptcy Court rightly adopted the strict interpretation of § 523(a)(2)(A).[25]

S.D. N.Y. 1999) (holding that "[t]he arguments supporting the strict view are more persuasive" because "[t]hey are consistent with ordinary usage and faithful to the intent of Congress as reflected in the statements of the sponsors" and "better reflect[] the limited purpose that subdivision (B) was intended to serve"); *Gehlhausen et al. v. Olinger (In re Olinger)*, 160 B.R. 1004, 1009 (Bankr. S.D. Ind. 1993) (holding that "[t]he ordinary usage of 'statement' in connection with 'financial condition' denotes either a representation of a person's overall 'net worth' or a person's overall ability to generate income"); *Bal-Ross Grocers, Inc., v. Sansoucy (In re Sanscoucy)*; 136 B.R. 20, 23 (Bankr. D. N.H. 1992) (holding that "financial condition" refers to "a balance sheet and/or profit and loss statement or other accounting of an entity's overall financial health and not a mere statement as to a single asset or liability").

21 *In re Van Steinburg*, 744 F.2d at 1060-61.

22 *In re Bandi*, 683 F.3d at 676 (holding that "financial condition" means "the general overall financial condition of an entity or individual, that is, the overall value of property and income as compared to debt and liabilities").

23 *Rose v. Lauer (In re Lauer)*, 371 F.3d 406, 413 (8th Cir. 2004). Although the Eighth Circuit did not explicitly endorse the strict interpretation, the Fifth Circuit notes that the Eighth Circuit's reasoning is consistent with the strict interpretation.

24 *Cadwell v. Joelson (In re Joelson)*, 427 F.3d 700, 706-07 (10th Cir. 2005).

25 *Lamar, Archer & Cofrin v. Appling (In re Appling)*, 500 B.R. 246, 251 (Bankr. M.D. Ga. 2013).

As the Fifth Circuit has noted, other provisions of the Bankruptcy Code to construe the phrase "financial condition" "to connote the overall net worth of an entity or individual."[26] Indeed, the Supreme Court has interpreted a statement of financial condition as equivalent to a statement about the debtor's "bank balance."[27] Other courts, like the fifth Circuit, have adopted the strict interpretation of "financial condition" and argue that it better comports with normal commercial usage,[28] the Bankruptcy Code's legislative history,[29] a harmonious reading of the Code,[30] and the purpose of § 523(a)(2)(B).[31] This Court

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26 *Bandi v. Becnel (In re Bandi)*, 683 F.3d 671, 676-77 (5th Cir. 2012) (citing 11 U.S.C. § 101(32)(A)-(C)).

27 *Id.* at 675 n.16 (quoting *Field v. Mans*, 516 U.S. 59, 76 (1995)). In *Field*, the Court repeatedly refers to "false financial statements," undermining the argument that Congress had not intended to limit § 523(a)(2)(B) to false financial statements, which previously had been "the strongest argument in favor of the broad interpretation." *In re Chivers*, 275 B.R. at 615 (citing *Field*, 516 U.S. at 76-77).

28 *Chivers*, 275 B.R. at 614-16 (quoting *Mercado*, 144 B.R. at 885) (noting the argument that "the normal commercial meaning and usage" of a statement of financial condition indicates either a representation of net worth or overall ability to generate income).

29 *Id.* at 615 (citing *In re Alicea*, 230 B.R. at 501-05 (noting the argument that the legislative history refers to "false financial statement[s]").

30 *Id.* (citing *In re Sansoucy*, 136 B.R. at 23) (noting the argument that "narrowing the definition of financial condition in § 523(a)(2)(B) necessarily expands those statements, both written and oral, that do not relate to financial condition that fall within § 523(a)(2)(A) and better harmonizes the statute").

concurs. Accordingly, statements respecting the debtor's financial condition involve the debtor's net worth, overall financial health, or equation of assets and liabilities. A statement pertaining to a single asset is not a statement of financial condition.

On appeal, Appellant argues this Court should follow the broad interpretation in accordance with *Bancorpsouth Bank v. Callaway* (*In re Callaway*)[32] and *Baker v. Sharpe* (*In re Sharpe*).[33] However, even the court in Callaway acknowledged that "a strict approach is preferable to an overly broad approach" to the meaning of the term "financial condition."[34] More importantly, the court in *Callaway* relied on the Bankruptcy Appellate Panel's holding in *Cadwell v. Joelson* (*In re Joelson*),[35] which the Tenth Circuit later reversed.[36] Likewise, the Fifth Circuit's decision in

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[31] *Id.* (citing *Field*, 516 U.S. at 76-77) (noting the argument that Congress designed § 523(a)(2)(B) to protect debtors from abusive lending practices). The Supreme Court's "recitation of the history of § 523(a)(2)(B) and its goal of preventing abuse by consumer finance companies . . . lends strong support for adoption of the strict interpretation." *Id.*

[32] 2006 WL 6589022 (Bankr. N.D. Ga. Nov. 28, 2006).

[33] B.R. 409 (Bankr. N.D. Tex. 2006).

[34] *Callaway*, 2006 WL 6589022, at *21.

[35] 307 B.R. 689 (10th Cir. 2004).

[36] *In re Joelson*, 427 F.3d at 715 (holding that "a statement about one of [the debtor's] assets is not a statement" that respects the debtor's financial condition and that "a statement about one part of [the debtor's] income flow . . . does not reflect [the debtor's] overall financial health" and, therefore, does not respect the debtor's financial condition).

Bandi v. Becnel (*In re Bandi*)[37] abrogated the holding of *Sharpe* on this issue.[38] Therefore, the Court finds neither case persuasive.

In the present case, the alleged misrepresentations consisted of two oral statements by Appellant. Therefore, to establish the debt's nondischargeability, Appellee needed to show that Appellant's statements did not involve Appellant's financial condition. Here, the Bankruptcy Court took the strict approach to the phrase "respecting the debtor's . . . financial condition," and found Appellant's statements about his tax refund involved a single asset rather than Appellant's net worth, overall financial health, or equation of assets and liabilities, therefore, making it subject to § 523(a)(2)(A).[39] Because the statements did not concern Appellant's financial condition, this Court finds the Bankruptcy Court did not err in holding Appellee stated a claim under § 523(a)(2)(A).

II. Nondischargeability

Under § 523(a)(2)(A), a debtor who makes a false statement not involving financial condition does not receive a discharge "for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by false pretenses, a false representation, or actual fraud . . . ."[40] To establish an exception to discharge under this section, the creditor must show that "the debtor made a false statement with the purpose and intention of deceiving the

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37 *In re Bandi*, 683 F.3d at 676.

38 *Id.*

39 *In re Appling*, 500 B.R. at 251.

40 11 U.S.C. § 523(a)(2)(A).

creditor; the creditor relied on such false statement; the creditor's reliance on the false statement was justifiably founded; and the creditor sustained damage as a result of the false statement."[41] An objecting creditor must prove each element by a preponderance of the evidence.[42] However, the "courts generally construe the statutory exceptions to discharge liberally in favor of the debtor."'[43]

A. False Statement with Intent to Deceive

To establish the first element of § 523(a)(2)(A), the creditor must show "that the debtor made a 'false representation' ... with the intent to deceive the creditor."[44] The debtor's "statement of intent to perform an act in the future will not generally form the basis of a false representation that is actionable under section 523(a)(2)(A) unless the creditor can establish that the debtor lacked the subject intent to perform the act at the time the statement was made."[45] Accordingly, the finder of fact must determine whether the debtor "in good faith ... intended to keep his promise."[46] While an honest but unreasonable belief in

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41 *Johannessen et al. v. Johannessen* (*In re Johannessen*), 76 F.3d 347, 350 (11th Cir. 1996).

42 *Equitable Bank v. Miller* (*In re Miller*), 39 F.3d 301, 304 (11th Cir. 1994) (citing *Grogan v. Garner*, 498 U.S. 279, 291 (1991)).

43 *Id.* (citing *Boroff v. Tully* (*In re Tully*), 818 F.2d 106, 110 (1st Cir. 1987)).

44 *Duncan v. Bucciarelli* (*In re Bucciarelli*), 429 B.R. 372, 375 (Bankr. N.D. Ga. 2010).

45 *Id.* (citing *Allison v. Roberts* (*In re Allison*), 960 F.2d 481 (5th Cir. 1992)).

46 *Palmacci v. Umpierrez*, 121 F.3d 781, 788 (1st Cir. 1997).

the truth of the representation does not by itself establish deceit, "the very unreasonableness of such a belief may be strong *evidence* that it does not in fact exist."[47] Moreover, the court may infer intent to deceive from the debtor's reckless disregard for the veracity of a statement.[48]

Because debtors generally do not admit they made a promise with the intent to deceive the creditor or without the intent to perform, the court may "infer such fraudulent intent from the facts and circumstances of the case."[49] The debtor's fraudulent intent constitutes an issue of fact and, therefore, this Court must review the Bankruptcy Court's determination under the "clearly erroneous" standard.[50] Because a determination of intent "depends largely upon an assessment of the credibility and demeanor of the debtor, deference to the Bankruptcy Court's factual findings is particularly appropriate."[51]

Here, Appellant first argues the Bankruptcy Court erred in finding Appellant made a false representation. Appellant points to his testimony, as well as Gordon's testimony, that he never stated a set amount for the expected tax refund in the March 2005 meeting.

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47 *Id.* (emphasis in original).

48 *In re Miller*, 39 F.3d at 305.

49 *In re Bucciarelli*, 429 B.R. at 375-76 (Bankr. N.D. Ga. 2010).

50 *Barnett v. Osbourne* (*In re Osborne*), 455 B.R. 247, 252 (Bankr. M.D. Fla. 2010).

51 *Williamson v. Fireman's Fund Insurance Co.*, 828 F.2d 249, 252 (4th Cir. 1987).

However, Lamar testified to the contrary, stating that Appellant said he "had met with his accountant and that they had already prepared the tax return for [sic], and he . . . was going to get a substantial refund, he represented in excess of $100,000" that he would use to pay the existing debt and future fees and expenses.[52] Because the Bankruptcy Court's finding of fact was supported by Lamar's testimony, this Court cannot say based on contradictory testimony it was clearly erroneous.[53]

Next, Appellant challenges the Bankruptcy Court's factual finding Appellant intended to deceive Appellee when he stated the refund would be approximately $100,000. The Bankruptcy Court made this finding after multiplying Appellant's income in 2002 and 2003 by a 28 percent tax rate.[54] Because Appellant related two different versions, the Bankruptcy Court found that the total amount of taxes paid was either $87,640 or $84,990.[55] In either case, the Bankruptcy Court found it implausible that Appellant's accountant would have told Appellant that his potential tax refund would have been over $100,000. Therefore, the Bankruptcy

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52 [Doc. 3] at 216.

53 *United States v. Copeland*, 20 F.3d 412, 413 (11th Cir. 1994) (noting that the appellate court "will not ordinarily review the factfinder's determination of credibility"); *see also Palmacci*, 121 F.3d at 785 (noting "[p]articular deference" is due to the bankruptcy court's "findings that depend on the credibility of other witnesses and on the weight to be accorded to such testimony").

54 [Doc. 1-2] at 10-11.

55 *Id.*

Court concluded that Appellant did not honestly believe he would receive a refund of over $100,000.[56]

On appeal, Appellant asserts the Bankruptcy Court speculated about what the accountant would have said about prevailing tax rates and argues the Bankruptcy Court's assumptions about tax rates do not constitute evidence. However, we conclude the Bankruptcy Court did not err. Appellant testified his accountant calculated his expected tax refund using a 28 percent interest rate; therefore, the Bankruptcy Court based its findings on the evidence of Appellant's own testimony rather than speculations or assumptions.[57]

Appellant also challenges the Bankruptcy Court's factual finding that he made a misrepresentation at the November 2005 meeting. In making its finding, the Bankruptcy Court relied on Lamar's testimony that Appellant falsely stated he had not yet received the refund check. Similar to his arguments regarding the March meeting, Appellant proffers his testimony as well as his wife's, which contradicted Lamar's testimony. Additionally, he contends the Bankruptcy Court violated Federal Rule of Evidence 1003 when it based its finding of a misrepresentation on its "suspicions" about Appellant's introduction of a copy of his wife's notes from the March meeting, rather than submitting the original notes.[58] Appellant further contends the Bankruptcy Court erred in finding fault with Appellant's submission of the copy of the notes rather than the original because Appellee failed to

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56 *Id.*

57 [Doc. 3] at 305.

58 [Doc. 1-2] at 14.

object to the admission of the copy. This Court finds Appellant's arguments unpersuasive.

Rule 1003 concerns the admissibility of a copy of an original document.[59] The credibility to be accorded the duplicate remains a question of fact.[60] Acting as finder of fact, the Bankruptcy Court found the admission of the copy rather than the original raised suspicions. Because the Bankruptcy Court's finding involved the credibility or weight to be given the document, it did not violate Rule 1003.

Moreover, even if the Bankruptcy Court's suspicions about the notes violated Rule 1003, these suspicions did not constitute the Bankruptcy Court's sole basis for its findings. The Bankruptcy Court explicitly based its findings on the demeanor of the witnesses, the conflicting testimony given by Appellant and his wife, and Appellant's failure to remind Lamar of his supposed November statements in the letter sent to Lamar in July 2006.[61] Consequently, this Court cannot say the Bankruptcy Court committed clear error by crediting the testimony of one witness over that of others.

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[59] Fed. R. Evid. 1003. The Rule provides that "[a] duplicate is *admissible* to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate" (emphasis added).

[60] *Hill v. City of Houston*, 235 F.3d 1339 (Table), 2000 WL 1672663, *7 (5th Cir. 2000) (noting that "under either rule [1003 or 1008], the question of whether [the document] is a fake or rather an authentic copy, [is] a fact question which [is] properly submitted to the jury") (unpublished opinion).

[61] [Doc. 1-2] at 14.

Finally, Appellant contends the Bankruptcy Court erred by failing to "apply the heightened standards required under 11 U.S.C. § 523(a)(2)(A) and relevant case law for statements concerning future acts and omissions."[62] In other words, Appellant argues the Bankruptcy Court improperly found Appellant actually intended to deceive Appellee in making his statement in March 2005 regarding the amount of his expected tax refund.

To constitute fraud under § 523(a)(2)(A), a false statement concerning a future act or omission requires "actual intent to mislead, which is more than mere negligence."[63] However, a court may infer actual intent to deceive from the debtor's reckless disregard for the truth of the representation.[64] The debtor's knowledge that he cannot pay constitutes a circumstance from which the court may infer intent to deceive.[65]

According to Appellant, his statement in March 2005 as to the amount of his expected tax return involved a future act and was an earnestly held belief, thereby precluding a finding of fraud absent actual intent not to perform. In support of his contention that he merely held an "overly optimistic" belief that his tax return would amount to approximately $100,000,[66]

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62 [Doc. 9] at 17.

63 *Palmacci*, 121 F.3d at 788.

64 *Id.* at 788-89 (citing *Ins. Co. of N. Am. v. Cohn* (*In re Cohn*), 54 F.3d 1108, 1118-19 (3d Cir. 1995)).

65 *Id.* at 789.

66 [Doc. 12] at 3.

Appellant cites *In re Hill*.[67] In *Hill*, the bankruptcy court found that no fraudulent misrepresentation occurred where the debtor claimed he would pay legal fees by refinancing his house, even though he was completing a credit counseling course as a prerequisite to filing in bankruptcy. However, unlike the present case, the court in *Hill* found that although the debtor's belief that he would be able to pay the legal fees was "unrealistic, [the debtor's] intention appear[ed] earnestly held."[68]

Here, the Bankruptcy Court inferred Appellant's intent to deceive based on the impossibility of Appellant's representation that his income multiplied by his stated tax rate could produce a tax refund of approximately $100,000 and found Appellant's belief was not earnestly held—in other words, Appellant intended to deceive Appellee. Because this Court must give great deference to the Bankruptcy Court's factual findings regarding intent,[69] we conclude the mathematical unreasonableness of Appellant's alleged belief constitutes sufficient evidence the belief was *not* earnestly held.[70] Therefore, the Bankruptcy Court did

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67 425 B.R. 766 (Bankr. W.D. N.C. 2010).

68 *Id.* at 776.

69 *Williams v. Fireman's Fund Insurance Co.*, 828 F.2d at 252.

70 Appellant further argues that the United States Supreme Court's holding in *Bullock v. Bankchampaign, N.A.*, 133 S. Ct. 1754 (2013), effectively abrogates a creditor's ability to establish intent to deceive based on reckless disregard. However, *Bullock* involved the scienter requirement for defalcation under 11 U.S.C. § 523(a)(4) and has no application here. Moreover, to the extent Appellant raises an equitable argument based on the totality of

not commit clear error by finding Appellant knowingly misrepresented the amount of the tax refund.

Moreover, even if the Bankruptcy Court had improperly found Appellant actually intended to deceive Appellee in the March 2005 statement, its conclusion is not error because Appellant's November 2005 statement did not involve a future act or intentional omission. At the November meeting, Appellant stated he had not yet received the tax refund, when in fact he had. Because this second misrepresentation involved a past event known at the time by Appellant to be false, Appellant cannot plausibly claim he lacked intent to deceive in making the statement. Consequently, the Bankruptcy Court did not err in finding Appellant made a false statement with intent to deceive.

B. Justifiable Reliance

Although the text of § 523(a)(2)(A) does not impose a reliance requirement, the United States Supreme Court has held that, in accordance with common law tort principles of fraud, an exception to discharge under this section requires justifiable reliance by the creditor on the debtor's false statement.[71] The justifiable reliance standard "does not mean that [the creditor's] conduct must conform to the standard of the reasonable man."[72] Instead, "[j]ustification is a matter of the qualities and characteristics of the particular plaintiff, and the circumstances of the particular case,

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the circumstances, this Court is not persuaded that Appellee's allegation of fraud requires strict scrutiny.

[71] *Field*, 516 U.S. at 69-75.

[72] *Id.* at 70-71 (quoting Restatement (Second) of Torts, § 545A, Comment *b* (1976)).

rather than of the application of a community standard of conduct to all cases."[73] Accordingly, the justifiable reliance standard is "less demanding" than the standard of reasonable reliance.[74] Under the justifiable reliance standard, the creditor need only investigate the facts if, "under the circumstances, the facts should be apparent to one of his knowledge and intelligence from a cursory glance, or he has discovered something which should serve as a warning that he is being deceived."[75] Justifiable reliance "requires only that the creditor did not 'blindly [rely] upon a misrepresentation the falsity of which would be patent to him if he had utilized his opportunity to make a cursory examination or investigation.'"[76]

Here, Appellant argues the Bankruptcy Court erred in finding Appellee relied, much less justifiably relied, on Appellant's false statement. Appellant contends Appellee could not have relied on Appellant's March 2005 statement that his future tax refund would be sufficient to pay the unpaid fees because Appellee knew of Appellant's poor financial condition. In particular, Appellant points to the facts that Appellee spoke to a bankruptcy attorney about Appellant, asked Appellant's mother to pay the bill at one point, and admitted it knew of Appellant's financial problems

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[73] *Id.* at 71 (quoting Restatement (Second) of Torts, § 545A, Comment *b* (1976)).

[74] *Id.* at 61.

[75] *Id.* at 71-72 (quoting W. Prosser, *Law of Torts* § 108, p. 718 (4th ed. 1971)).

[76] *Ojeda v. Goldberg*, 599 F.3d 712, 717 (7th Cir. 2010) (quoting *Field*, 516 U.S. at 71).

arising from the business. Moreover, Appellant contends Appellee's actions after the March 2005 indicate a lack of reliance given that Appellee did not know the IRS would even approve the tax return, did not review the tax return, did not draw up any documents to reflect assignment of the funds from the tax return, and did not write a letter confirming its conversations with Appellant.

Contrary to Appellant's assertions, however, whatever Appellee may have known or suspected about Appellant's financial condition has no bearing on whether Appellee justifiably relied upon Appellant's statement in March 2005 that he would receive a tax refund. Appellant can point to no evidence of deceit with respect to the tax refund that should have been apparent to Appellee upon a "cursory examination."[77] Poor overall financial health does not inherently preclude receipt of a substantial tax refund. Therefore, under the justifiable reliance standard, Appellee had no duty to investigate the matter. That Appellant did, in fact, receive a significant tax refund in the amount of $59,851 only underscores the justifiability of Appellee's reliance, even if the refund was considerably less than Appellant had promised. Moreover, Appellant fails to cite any evidence specific to the November 2005 statement indicating Appellee could not have justifiably relied upon the statement. To the extent Appellant argues that Appellee's knowledge of Appellant's general financial condition precluded justifiable reliance, that argument fails for the same reasons it fails for the March 2005 statement.

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[77] *Id.*

At trial, Lamar testified Appellee agreed to continue representing Appellant in reliance on Appellant's false statements about the tax refund. Lamar further testified that had Appellee known the truth, it would have stopped the representation, put an attorney's lien on Appellant's file, and begun collection of unpaid fees. Because Appellant has no evidence that should have alerted Appellee to Appellant's deceit specifically regarding the tax refund, the Bankruptcy Court did not err in determining Appellee established justifiable reliance.

III. Damages

Section 523(a)(2)(A) of the Bankruptcy Code renders nondischargeable certain fraudulently-incurred debts "for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by false pretenses, a false representation, or actual fraud . . . ."[78] Consequently, the statute applies to both "the primary debtor-creditor relationship" and "secondary debt transactions."[79] While the primary debtor-creditor relationship involves provision of money, property, or services, secondary debt transactions include extensions, renewals, and refinancing.[80] A secondary debt transaction constitutes "an autonomous transaction that results in the lengthening of a debtor-creditor relationship" whereby "the creditor grants a

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[78] 11 U.S.C. § 523(a)(2)(A).

[79] *Foley & Lardner v. Biondo* (*In re Biondo*), 180 F.3d 126, 131-32 (4th Cir. 1999).

[80] *Id.*

reprieve to the debtor."[81] Therefore, an extension of credit represents "an agreed enlargement of time allowed for payment."[82]

Although the Eleventh Circuit has not addressed the issue, several courts have held § 523(a)(2) does not impose a "new money" requirement on claims arising out of secondary debt transactions.[83] In other words, "a false representation in connection with a renewal or refinancing of credit may render the entire debt nondischargeable" even if the creditor did not lend new money in reliance on the false statement.[84]

Here, Appellant argues the Bankruptcy Court erred in measuring damages by the entire amount of Appellee's claim rather than by the damages arising

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[81] *Id.*

[82] *Id.*

[83] *See Household Fin. Corp. v. Greenidge* (*In re Greenidge*), 75 B.R. 245, 247 (Bankr. M.D. Ga. 1987) (holding that "the better view is that a false representation in connection with a renewal or refinancing of credit may render the entire debt nondischargeable"); *Cho Hung Bank v. Kim* (In re *Kim*), 62 F.3d 1511 (9th Cir. 1995) (citing *Cho Hung Bank v. Kim* (*In re Kim*), 163 B.R. 157, 159 (9th Cir. BAP (Cal.) 1994)) (adopting Bankruptcy Appellate Panel's holding that there is no requirement that "'an extension of credit' be joined by an advance of further funds in order for a creditor to have a claim for relief"); *In re Ojeda*, 599 F.3d at 720 (holding that because creditor forbore from collecting the entire debt due to debtor's fraudulent inducement, the entire debt was nondischargeable); *Wolf v. Campbell* (*In re Campbell*), 159 F.3d 963, 966-67 (6th Cir. 1998) (holding that because creditor's forbearance from demanding immediate repayment of the debt was based on the false statement, the entire amount was nondischargeable).

[84] *In re Greenidge*, 75 B.R. at 247.

after Appellant's misrepresentation. Appellant does not seriously dispute the absence of a *per se* "new money" requirement for nondischargeability. Instead, he argues the measure of damages is zero because Appellee extended no new net value after Appellant's false statement in March 2005. In support of this argument, Appellant cites *Household Finance Corp. v. Greenidge* (*In re Greenidge*), wherein the Bankruptcy Court held that, even without a "new money" requirement, the refinanced portion of the debt was dischargeable because the creditor failed to establish its reliance as to that portion.[85] In effect, Appellant seeks to import a "new money" requirement into the measure of damages. Under such a rule, a creditor attempting to establish the nondischargeability of a debt would have to prove "how it would have collected the debt, what assets would have been available then but not later," and the specific "pecuniary loss due to the forbearance from collecting the debt . . . ."[86]

Appellant's reliance on *Greenidge*, however, is inapposite. There, the Bankruptcy Court held the creditor provided insufficient evidence "to prove that it forfeited any remedies or otherwise relied to its detriment on the Debtor's false financial statement in refinancing the earlier debt . . . ."[87] Here, in contrast, the Bankruptcy Court found that once Appellant became delinquent on payments, Appellee forbore from collecting the overdue amounts in reliance on Appellant's false statement. This forbearance

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85 *Id.*

86 [Doc. 9] at 25.

87 *In re Greenidge*, 75 B.R. at 247.

constituted an extension of credit. Accordingly, the entire debt is nondischargeable.

Finally, Appellant argues Appellee failed to prove any damages because the debt was uncollectible both before and after Appellant's false statements. However, "[a] creditor need not also show that he could have collected on the loan prior to the bankruptcy but for the new extension of credit" to establish the debt is nondischargeable.[88] A debtor's "incentive to act with integrity should not end once he becomes insolvent," and bankruptcy law should avoid "creat[ing] a perverse incentive for insolvent debtors to lie to creditors to get them to forbear collection" of debts.[89] Consequently, Appellant's insolvency does not preclude Appellee from establishing that the entire debt is nondischargeable.

CONCLUSION

Having reviewed the applicable law and the arguments of the parties, the Court agrees with the decision of the Bankruptcy Court. Accordingly, it is **HEREBY ORDERED** that the decision of the Bankruptcy Court be **AFFIRMED**.

SO ORDERED, this 28th day of March, 2016.

S/C. Ashley Royal
C. ASHLEY ROYAL, JUDGE
UNITED STATES DISTRICT COURT

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88 *In re Campbell*, 159 F.3d at 966-67 (citing *Shawmut Bank, N.A., v. Goodrich* (*In re Goodrich*), 999 F.2d 22, 25-26 (1st Cir. 1993)).

89 *Id.*

SIGNED this 10 day of March, 2015 [seal omitted]

/s/ James P. Smith
James P. Smith
Chief United States
Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

In the Matter of:	:	Chapter 7
R. SCOTT APPLING,	:	Case No. 13-30083-JPS
CONNIE F. APPLING,	:	
Debtors	:	
	:	
LAMAR, ARCHER & COFRIN, LLP,	:	
Plaintiff	:	
	:	Adversary Proceeding
v.	:	No. 13-3042
	:	
R. SCOTT APPLING,	:	
Defendant	:	

BEFORE
James P. Smith
United States Bankruptcy Judge
527 B.R. 545

MEMORANDUM OPINION

This is an adversary proceeding in which Plaintiff seeks to have its claim against Debtor R. Scott

Appling[1] determined nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A). As originally pled in its complaint, Plaintiff contended that when Debtor promised to use an anticipated tax refund to pay legal fees owed to Plaintiff, he committed fraud because he, in fact, never intended to do so. However, at trial, Plaintiff amended its contentions to allege that Debtor lied about when an amended tax return had been prepared and the amount of the refund, and then subsequently lied about not having received it.[2]

The matter was tried on September 18 and 23, 2014. At the conclusion of the trial, the Court requested that the parties submit their closing arguments in writing. By consent of the parties, the written arguments were delayed until a transcript of the trial was obtained. The transcript has now been prepared and filed and the final brief was filed in the case on January 21, 2015. Having considered the testimony and exhibits introduced at trial, the arguments of counsel and the law, the Court now publishes its findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052.

FACTS

In 2002, Debtor was a mortgage loan originator who earned $270,922. In July 2003, he began working for a bank earning $3,000 per month. In June 2004, Debtor purchased a business and quit his bank job. He soon

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1 Plaintiff does not hold a claim against codebtor Connie F. Appling and she is not a party to this adversary proceeding.

2 Pursuant to Bankruptcy Rule 7015, Rule 15 F.R.Civ.P. applies in adversary proceedings. Rule 15(b)(2) provides, in part, "When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings."

discovered his new company had serious financial problems the prior owners had allegedly failed to disclose. With a large debt payment to the sellers approaching, Debtor decided to seek legal advice.

In July 2004, Debtor retained Plaintiff law firm to represent him and his company in an attempt to rescind the purchase of the company from its prior owners on the grounds that the financial condition of the company had been misrepresented. Debtor agreed to pay Plaintiff on an hourly basis, with invoices for fees and costs to be paid monthly. Walter Gordon, a sole practitioner in Hartwell, Georgia, was retained as local counsel on a similar fee basis. Thereafter, litigation against the prior owners and other defendants ensued in the Superior Court of Franklin County, Georgia.

By March 2005, Debtor had run up a sizeable unpaid amount of fees and costs to both Plaintiff and Mr. Gordon. Debtor owed Plaintiff approximately $60,800 and Mr. Gordon approximately $18,000. A conference was scheduled in Mr. Gordon's office in Hartwell, Georgia, to discuss the status and prospects of the litigation and how the fees could be brought current. Prior to the meeting, Debtor sent an email to David Davenport, a partner at Plaintiff law firm who was handling Debtor's case, complaining about the fees and costs being incurred in the litigation, the lack of progress in the litigation and concluding with a derogatory joke about lawyers. Robert Lamar, a partner at Plaintiff law firm who was in charge of Debtor's account at the firm, responded by letter in which Mr. Lamar gave his analysis of the status of the litigation, his response to the complaints about the fees and costs and advised Debtor that if the fees and costs

were not brought current, the firm would withdraw from representation and place an attorney's lien on all work product until the fees and costs were paid.[3]

The meeting occurred on March 18, 2005. At the meeting, Plaintiff contends that Debtor represented that his accountant had prepared an amended tax return and that he would receive a tax refund of approximately $100,000, which would be enough to pay current and future fees. Plaintiff asserts that, in reliance on these representations, Plaintiff continued to represent Debtor and did not begin collection of its fees.

The litigation was thereafter settled in stages, with settlements with each of the defendants occurring at different times. The settlements reduced Debtor's remaining financial obligations to the defendants. All matters relating to the litigation and settlement were concluded by March 2006.

On June 15, 2005, Debtor and his wife signed an amended tax return for the 2002 tax year for the refund in question. However, rather than a refund of approximately $100,000, the amended return sought a refund of only $60,718. This amount was further reduced by the IRS in October 2005 to $59,851.[4] The

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[3] In Georgia, an attorney has a lien on all papers of their client in their possession until all fees and costs for services rendered are paid. O.C.G.A. § 15-19-14(a).

[4] Although Debtor testified that both his 2002 and 2003 returns were amended, the only amended return introduced at trial was the 2002 amended return. Further, there was no testimony or other evidence that Debtor received any refund other than the refund for 2002. Accordingly, the Court concludes that the 2003 return was not amended.

evidence establishes that Debtor received a check for this amount prior to November 2005. Debtor did not pay any of the refund to Plaintiff or Mr. Gordon.

Plaintiff and Debtor had another meeting on November 2, 2005, to discuss the outstanding fees and the firm's willingness to continue with the representation, as well as filing a new law suit against a party involved in Debtor's purchase of the business who had not been sued in the original litigation. Plaintiff alleges that Debtor again made representations regarding the tax refund and, in reliance thereon, Plaintiff agreed to complete the pending litigation and forego immediate collection of the fees. However, Plaintiff refused to undertake any additional representation.

Ultimately, in June 2006, Plaintiff and Mr. Gordon allegedly learned Debtor had received and spent the refund in his business and would not use the refund to pay their fees. Plaintiff filed suit against Debtor for the unpaid fees and costs and received a judgment in October 2012 in the Superior Court of Hart County, Georgia for $104,179.60. Debtor and his wife filed Chapter 7 bankruptcy in January 2013.

Plaintiff asserts that Debtor made misrepresentations about the tax refund at both the March and November 2005 meetings. Plaintiff contends that it justifiably relied on these representations and continued to represent Debtor and forego collection of its fees. Accordingly, Plaintiff contends its claim of $104,179.60, evidenced by the judgment from the Superior Court of Hart County, Georgia, is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A).

DISCUSSION

Plaintiff has the burden of proving by a preponderance of the evidence that the claim is nondischargeable. Grogan v. Garner, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed. 2d 755 (1991). If Plaintiff fails to prove any of the elements of the claim:

> ...the debt is dischargeable. Moreover, courts generally construe the statutory exceptions to discharge in bankruptcy "liberally in favor of the debtor," and recognize that "'[t]he reasons for denying a discharge...must be real and substantial, not merely technical and conjectural.'" In re Tully, 818 F.2d 106, 110 (1st Cir. 1987) (quoting Dilworth v. Boothe, 69 F.2d 621, 624 (5th Cir. 1934)); see also, Boyle v. Abilene Lumber, Inc., (Matter of Boyle), 819 F.2d 583, 588 (5th Cir. 1987). This narrow construction insures that the "honest but unfortunate debtor" is afforded a fresh start. Birmingham Trust Nat'l Bank v. Case, 755 F.2d 1474, 1477 (11th Cir. 1985)...

Equitable Bank v. Miller (In re Miller), 39 F.3d 301, 304 (11th Cir. 1994).

11 U.S.C. § 523(a)(2)(A) bars in relevant part, the discharge of debts for services or an extension or renewal of credit resulting from "false pretenses, a false representation, or actual fraud...."

> The elements of a claim under § 523(a)(2)(A) are: the debtor made a false statement with the purpose and intention of deceiving the creditor; the

> creditor relied on such false statement; the creditor's reliance on this false statement was justifiably founded; and the creditor sustained damage as a result of the false statement.

Johannessen v. Johannessen, 76 F.3d 347, 350 (11th Cir. 1996).

A fraudulently induced forbearance from collection constitutes an extension of credit for purposes of 11 U.S.C. § 523(a)(2)(A). Ojeda v. Goldberg, 599 F. 3d 712, 718 (10th Cir. 2010); Foley & Lardner v. Biondo (In re Biondo), 180 F. 3d 126, 132-33 (4th Cir. 1999); Wolf v. Campbell (In re Campbell), 159 F. 3d 963, 966 (6th Cir. 1998); Field v. Mans, 157 F. 3d 35, 43 (1st Cir. 1998). Further:

> 'As distinguished from false representation, which is an express misrepresentation[,] false pretense involves an implied misrepresentation or conduct intended to create and foster a false impression,' Minority Equity Capital Corp. v. Weinstein (In re Weinstein), 31 B.R. 804, 809 (Bankr. E.D. N.Y. 1983), and '[i]t is well recognized that silence, or the concealment of a material fact, can be the basis of a false impression which creates a misrepresentation actionable under § 523(a)(2)(A),' id.; see also, e.g., Citizens & S. Nat'l Bank v. Thomas (In re Thomas), 12 B.R. 765, 768 (Bankr. N.D. Ga. 1981) ('A debtor's silence may amount to a materially false representation prohibiting discharge of the indebtedness.').

SunTrust Bank v. Brandon (In re Brandon), 297 B.R. 308, 313 (Bankr. S.D. Ga. 2002).

> Because direct proof of intent (i.e., the debtor's state of mind) is nearly impossible to obtain, the creditor may present evidence of the surrounding circumstances from which intent may be inferred.

Caspers v. Van Horne (Matter of Horne), 823 F.2d 1285, 1287 (8th Cir. 1987), abrogated on other grounds by Grogan v. Garner, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed. 2d. (1991).

False Statement Made With Intention To Deceive

The March 18, 2005 Meeting

By letter dated March 9, 2005, Mr. Lamar advised Debtor that unless the fees owed to Plaintiff and Mr. Gordon were brought current promptly, the firms would withdraw from the representation and place an attorney's lien on all of their work product. The evidence establishes that Debtor understood that the trial of his state court litigation was to take place within the next few months.

Debtor testified that he called his accountant, Mike Strickland, CPA, before the meeting to discuss possible sources of cash. According to Debtor, Strickland told him the IRS allowed recouping of losses from the business against taxes previously paid and inquired about Debtor's 2002 and 2003 income.[5] At one point in

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[5] The evidence suggests that Mr. Strickland did not prepare these returns. Debtor was referred to and retained Strickland in June 2004, which would be after these returns were due. Transcript, Sept. 18, 2014, page 135.

his testimony, Debtor testified that he told Strickland his income for 2002 was $295,000 and that Strickland calculated that, based on a 28 percent tax rate, Debtor would have paid taxes of over $100,000. Based on this calculation, he testified that Strickland told him he could get a tax refund for that approximate amount. At another point in his testimony, Debtor testified that he used his last paycheck from 2002[6] to provide Strickland with his income, then provided his wife's income and his 2003 income and Strickland estimated the taxes paid and potential refund at $104,000 to $105,000. Debtor testified that at the March meeting he told Mr. Lamar and Mr. Gordon that, based on Strickland's advice, there was a possibility he would receive a $100,000 refund and, if he got that amount, he could pay their bills.

Mr. Lamar testified that Debtor told them that the amended return had been prepared, was ready for filing, and that he would be getting $100,000 back, which he would use to pay their fees. Mr. Gordon testified that Debtor told them he felt like the refund would be approximately $100,000 and that he would use the money to pay their fees. However, Mr. Gordon testified that, "I'd asked him if he had the return. I don't think it had been prepared at that point."[7]

Plaintiff contends that Debtor's representations regarding the possible tax refund were false for two

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6 At another point, Debtor testified that he used his 2002 W-2 form to provide Strickland with this information. The difference in the testimony is not material since both forms would have disclosed the same information regarding income and taxes withheld.

7 Transcript, Sept. 18, 2014, page 17.

reasons. First, Plaintiff contends that Debtor falsely represented that the amended return had been prepared and was ready to file. Secondly, Plaintiff contends that Debtor knowingly lied about the refund amount because Debtor knew the refund would not be approximately $100,000.

As for the alleged misrepresentation that the amended return had been prepared by the March 18, 2005 meeting, the evidence is conflicting. The evidence establishes that the return had, in fact, not been prepared by that time. Mr. Lamar testified that Debtor represented that it had. Both Debtor and Mr. Gordon testified that no such representation was made. In light of the fact that Mr. Gordon has no financial interest in this litigation (and even if he did, his testimony would be adverse to that interest), the Court is inclined to accept his version of facts and finds that Plaintiff has failed to prove by a preponderance of the evidence that Debtor represented at the March meeting that the amended return had already been prepared.

However, the Court does find that Plaintiff has carried its burden to prove that Debtor knowingly made a false representation with intent to deceive when he represented that the refund would be approximately $100,000. As stated, Debtor gave two slightly different versions of his conversation with Strickland. In the first version, he testified that he reported to Strickland his 2002 income of $295,000 and his 2003 income of $18,000, a total of $313,000. If Strickland assumed a tax rate of 28 percent, as Debtor testified, the taxes on $313,000 income would be $87,640. The Court does not believe that an experienced CPA would have told Debtor, based on

these numbers, that the taxes paid (and thus the amount eligible for refund) would have been approximately $100,000.

In the second version, he testified that he gave Strickland his 2002 income of $260,000 from either his last paycheck or his 2002 W-2 form. He then added his wife's income for 2002 and 2003 and his 2003 income, and from this information, Strickland came up with taxes (and thus a potential refund) of $104,000 to $105,000. From the 2002 amended return, we know that Debtor and his wife's adjusted gross income for 2002 was $296,325, on which they paid taxes of $68,190. Debtor and his wife's total income in 2003 was at most $60,000.[8] Assuming a 28 percent tax rate, taxes on the 2003 income would have been $16,800. Thus, the total taxes paid by Debtor and his wife in 2002 and 2003 was only $84,990. It is simply not plausible to believe that Strickland, with this information, would have told Debtor that his taxes and potential refund would be between $104,000 and $105,000.

Accordingly, the Court does not believe Debtor's testimony that he honestly thought that he would receive a refund of approximately $100,000. Rather, the Court finds that Debtor knowingly misrepresented the amount of the tax refund to prevent Plaintiff from withdrawing from representing him and beginning collection activities.

The November 2, 2005 Meeting

Debtor testified that after receiving the tax refund in late October 2005, he called Mr. Lamar to schedule a meeting to discuss the outstanding fees and starting

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8 Transcript, Sept. 23, 2014, page 46.

new litigation. Debtor testified that he and his wife attended the meeting on November 2, 2005 in Plaintiff's Atlanta office.[9] According to Debtor, he asked Mr. Lamar to reduce the bill and Mr. Lamar refused. He testified that he asked Mr. Lamar to start the new litigation on a contingency fee basis and Mr. Lamar refused. He testified that Mr. Lamar asked about the refund and that Debtor responded that he had the refund but that it was less than expected. However, he testified that he did not tell Mr. Lamar the actual amount of the refund. He testified that he then told Mr. Lamar that if he paid the refund to Plaintiff, he would be out of business, but if he kept the money, he might have a chance at keeping his business going. Debtor testified, "And I looked at him and I said, 'So I guess you know what my decision is going to be.' And my wife and I stood up and we walked out."[10]

Debtor's wife, Mrs. Appling, gave testimony that was generally consistent with Debtor's version. She testified that Debtor told Mr. Lamar that he had received the refund but did not disclose the amount. At trial she produced a copy, but not the original, of notes she said she made at the meeting and completed on their drive home. She said the original was somewhere in multiple boxes of files and she had found the copy in a box of bills a couple of months before the trial. The notes state "I too have to make a business decision & decide to try to keep the business open as long as I can"[11] which could be interpreted to be

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9 Mr. Gordon was not at this meeting.

10 Transcript, Sept. 18, 2014, page 172.

11 Defendant Exhibit 10.

consistent with Debtor's version that he told Mr. Lamar that he was keeping the money. However, Mrs. Appling testified that Debtor told Mr. Lamar, "...I have to make a business decision either to keep my business afloat or go bankrupt. That's what he said. He never said he was not going to pay him. He said, I have to make a business decision, just like you, Bob Lamar. I have to decide if I am going to keep my business going and try to keep a roof over my family's house, my family—that's the decision I have to make. He did not say, I'm not going to pay you."[12] This testimony suggests that Debtor had not made up his mind on what he would do with the tax refund, which is contrary to Debtor's testimony.

Mr. Lamar's recollection of the meeting was very different. Although he testified he refused the request to reduce the bill and to take on the new litigation, he testified that when he asked Debtor whether Debtor had received the refund, Debtor said his accountant had not properly handled the amended tax return, that Debtor had to refile it and that Debtor had not yet received the refund. Mr. Lamar testified that Debtor represented he still expected to get an amount sufficient to recover all of the fees and, based upon that representation, Plaintiff continued to represent Debtor and did not pursue immediate collection efforts.

Mr. Lamar testified that he did not learn until June 2006 that Debtor had received and spent the refund money and was not going to pay anything to Plaintiff. Upon learning this, Mr. Lamar immediately wrote a letter to Debtor, dated June 26, 2006, recapping the course of the litigation, reminding Debtor of his

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12 Transcript, Sept. 23, 2014, pages 95-96.

promise to use the refund to pay the fees, stating that Plaintiff had just learned that the refund had been received and spent and threatening suit if all fees were not paid within fourteen days. He concluded the letter by opining that any debt to Plaintiff could not be discharged in bankruptcy due to Debtor's fraudulent representations.

Debtor responded by letter dated July 19, 2006, in which Debtor complained about how his case had been handled, the amount of the fees, Plaintiff's refusal to reduce the fees and Plaintiff's refusal to pursue new litigation. He then reported in the letter that after the November meeting, he met with a bankruptcy attorney who recommended that Debtor keep the money to try to keep the business open. He further stated "There was nothing fraudulent on my part in not giving you that refund. It should be obvious as to what I chose to do since we are still open."[13] This suggests that Debtor did not make the decision to keep the refund until after meeting with the bankruptcy attorney, which is contrary to Debtor's testimony that he told Mr. Lamar of his decision at the November meeting.

Having heard the evidence, observed the demeanor of the witnesses and reviewed the documents introduced, the Court finds that Plaintiff has proven by a preponderance of the evidence that Debtor, with intent to deceive, made an intentional and knowingly false representation at the November 2005 meeting that he had not yet received the refund. The Court does not believe the testimony of Debtor and his wife. Both Debtor and his wife gave conflicting testimony as to what Debtor told Mr. Lamar at the November

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[13] Plaintiff Exhibit 4.

meeting. The finding of a copy, but not the original, of the alleged notes from the November meeting seems suspicious. Given Debtor's propensity to recount past events in the light most favorable to his perspective, the Court believes that if he had told Mr. Lamar at the November meeting that he had received the refund, that it was less than expected, and that he planned to use it to keep the business open instead of paying Plaintiff, Debtor would have reminded Mr. Lamar of this in his July 2006 letter. That he did not do so strongly suggests that it did not happen.

On the other hand, Mr. Lamar's actions in sending the letter in June 2006, is consistent with his testimony that Debtor told him at the November meeting that he had not yet received the refund. Accordingly, the Court finds Mr. Lamar's testimony more credible.

In addition, the Court finds that Debtor intentionally mislead Plaintiff and committed a false pretense by not disclosing the true amount of the refund at the November meeting. Based on his prior representation at the March meeting, Debtor knew that Mr. Lamar believed the refund was supposed to be approximately $100,000. Debtor testified he told Mr. Lamar at the November meeting that the refund was less than expected but he did not disclose the actual amount of the refund. Mr. Lamar testified Debtor continued to represent the refund was sufficient to cover all fees.

The Court does not believe Debtor's testimony. Given the amount of outstanding fees and that the refund was the sole source of payment, had Debtor told Mr. Lamar that the refund was less than expected, Mr. Lamar would have demanded to know the exact amount so that he could make a decision as to how his

firm would proceed. By failing to disclose that the actual refund was forty percent less than previously represented, and an amount insufficient to pay the outstanding fees owed to Plaintiff and Mr. Gordon, Debtor committed a false pretense.[14] Once again the intent to deceive is obvious. By failing to admit that he had received the refund and disclosing that it was significantly less than previously represented, Debtor was again able to avoid Plaintiff terminating its representation and beginning collection activity.

Reliance

Having determined that Debtor made misrepresentations regarding the tax refund with intent to deceive, the Court now turns to the reliance requirement. As this Court previously held in denying Debtor's motion to dismiss:

> Although section 523(a)(2)(A), by its terms, does not contain a reliance requirement, the Supreme Court, in Field v. Mans, 516 U.S. 59, 116 S.Ct. 437, 133 L.Ed.2d 351 (1995), concluded that Congress intended to adopt the common-law meaning of the terms "false pretenses, a false representation, or actual fraud" for purposes of section 523(a)(2)(A). 516 U.S. at 69, 116 S.Ct. at

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[14] Debtor's reliance on the case of Duncan v. Bucciarelli (In re Bucciarelli), 429 B.R. 372 (Bankr. N.D. Ga. 2010) is misplaced. Bucciarelli did not involve an act of omission. Rather, Bucciarelli involved a promise to pay which the court found the debtor never intended to perform. Although the Plaintiff here initially made a similar allegation, that allegation was abandoned at trial. See supra p. 3.

> 443. Therefore, the Court ruled that, consistent with common-law requirements, a claim under section 523(a)(2)(A) requires "justifiable reliance". 516 U.S. at 70-76, 116 S.Ct. at 443-46.
>
> The Court made clear that "justifiable reliance" allows the creditor to rely on the representation of the debtor unless there are facts known to the creditor that would have alerted him to the falsity of the debtor's representation. Thus, a creditor is entitled to rely on the debtor's representation that his property is free of liens without first conducting a title search of the public real estate records. 516 U.S. at 70, 116 S.Ct. at 444.

Lamar, Archer & Cofrin, LLP v. Appling (In re Appling), 500 B.R. 246, 253 (Bankr. M.D. Ga. 2013) (footnote omitted).

Mr. Lamar testified that Plaintiff agreed to continue its representation of Debtor and forego collection activities in reliance upon Debtor's representations regarding the tax refund. He testified that with respect to both meetings, had Plaintiff known the truth, Plaintiff would have immediately withdrawn from the representation, placed an attorney's lien on Debtor's file and begun collection activities. There was no evidence to the contrary.

Debtor argues that Plaintiff could not justifiably rely on Debtor's representations because Plaintiff was fully aware of Debtor's precarious financial condition and had asked Debtor's mother to assist Debtor in

paying the bill. However, Plaintiff's knowledge of Debtor's financial condition supports Plaintiff's justifiable reliance. Plaintiff clearly believed that the tax refund was the only source of cash Debtor would have to pay the fees. Plaintiff was aware of no facts which would have led it to doubt its client's representations about the amount of the refund or the timing of its receipt and, thus, was not on notice to conduct any further inquiry. Accordingly, Plaintiff was justified and did rely on Debtor's representations regarding the tax refund.

Damages

Debtor argues that Plaintiff is only entitled to those damages which arose after the alleged misrepresentations. He contends that because his payments after the meetings exceeded the fees earned, any nondischargeable amount must be significantly less than the full amount of Plaintiff's claim, much of which is composed of fees earned before the misrepresentations were made. However, this Court has already addressed this issue in its prior decision denying Debtor's motion to dismiss. As this Court held:

> However, as explained by the court in Foley & Lardner v. Biondo (In re Biondo), 180 F.3d 126 (4th Cir. 1999):
>
> > Through explicit language, Congress provided not only that debts incurred through the direct provision of money, property, or services, but also that the extension, renewal, or refinancing of credit, would fall under the purview of Bankruptcy Code § 523(a)(2)(A)...

> Section 523(a)(2)(A) covers debts incurred through the direct provision of 'money, property, [or] services.' As noted above, the primary debtor-creditor relationship is covered by § 523(a)(2)(A) through express language extending its scope to debts incurred through the direct acquisition of value. See 11 U.S.C. § 523(a)(2)(A) (including 'any debt...for money, property, services'). Section 523(a)(2)(A), however, also reaches secondary debt transactions-extensions, renewals, and refinancing...
>
> Our definition focuses on an 'extension' of credit as an autonomous transaction that results in the lengthening of a debtor-creditor relationship. Black's Law Dictionary defines extension as '[a]n allowance of additional time for the payment of debts.' Black's Law Dictionary 583 (6th ed. 1990). In other words, despite the fact that a debt may already be due, the creditor grants a reprieve to the debtor....A extension of credit is analogous to the classic forbearance granted by a creditor in relation to a matured debt. Extensions of credit under 523(a)(2) are thus properly viewed as merely an agreed enlargement of time allowed for payment.

180 F.3d at 131-32.

See Ojeda v. Goldberg, 599 F.3d 712 (7th Cir. 2010) (although original loan not

> obtained by fraud, extension procured by fraud made entire debt nondischargeable); Wolf v. Campbell (In re Campbell), 159 F.3d 963 (6th Cir. 1998) (fraudulently obtained extension of a nonfraudulent, dischargeable old debt renders debt nondischargeable even though debt was not collectable at time of extension because debtor was insolvent); Cho Hung Bank v. Kim (In re Kim), 62 F.3d 1511 (9th Cir. 1995) (although original loan was obtained without fraud, extension obtained through false statement made debt nondischargeable even though no new money was advanced at time of extension); Household Finance Corp. v. Greenidge (In re Greenidge), 75 B.R. 245, 247 (Bankr. M.D. Ga. 1987) (Laney, J.) (false representation in connection with renewal or refinancing of credit renders entire debt nondischargeable).

In re Appling, at 254-55.

The Court also rejects Debtor's argument that Plaintiff has failed to show how it could have collected its debt, given Debtor's financial condition. In Wolf v. Campbell (In re Campbell) the Sixth Circuit stated:

> ...Campbell argues that the statutory phrase "to the extent obtained by" requires a creditor to demonstrate in a quantifiable manner that he was further injured because he lost a collection remedy or incurred some other detriment by forbearing. Campbell contends that

the Wolfs cannot establish such injury since he was already insolvent when the Wolfs made the extension of credit. In other words, Campbell claims that the Wolfs lost nothing as a result of waiting to pursue collection because they would not have been able to collect from him anyway at the time they decided to forbear.

The Ninth Circuit seems to agree with this argument. It has construed the statute to require the creditor to establish damage through the loss of a valuable collection remedy. But several other circuits have declined to so hold, and we think they have the better side of the argument. *Compare In re Siriani*, 967 F.2d 302, 305 (9th Cir. 1992), *with Matter of McFarland*, 84 F.3d 943, 947 (7th Cir.), *cert. denied*, ---- U.S. -----, 117 S.Ct. 302, 136 L.Ed.2d 220 (1996); *Matter of Norris*, 70 F.3d 27, 29 n. 6 (5th Cir. 1995); *In re Goodrich*, 999 F.2d 22, 25 (1st Cir. 1993).

We reject Campbell's theory regarding the meaning of the phrase "to the extent obtained by." A contractual "refinancing" or "extension of credit" is sufficient without showing further damage. A creditor need not also show that he could have collected on the loan prior to the bankruptcy but for the new extension of credit. See the thorough discussion of this issue in *Goodrich*, 999 F.2d at 25-26.

. . .

> To hold otherwise would create a perverse incentive for insolvent debtors to lie to creditors to get them to forbear collection of past due indebtedness and would remove the primary legal incentive for fair dealing namely, nondischargeability in bankruptcy when a contract is induced by fraud. A borrower's incentive to act with integrity should not end once he becomes insolvent. The bankruptcy law should encourage, not discourage, honesty among contracting parties, especially when there is temptation to lie because of the risk of default.

159 F.3d 963, 966-67 (6th Cir. 1998).

In this case, when the March 2005 meeting occurred, Debtor owed Plaintiff $60,819.97. When the November meeting occurred, Debtor owed Plaintiff $58,796.32. Those fees were due and payable at those times. As a result of Debtor's misrepresentations, Plaintiff agreed to continue to represent Debtor and to not withdraw or attempt collection of the fees. Thus, Plaintiff gave Debtor an extension with respect to the fees and costs then due. This made the entire debt nondischargeable.

CONCLUSION

Plaintiff's claim against Debtor of $104,179.60 is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A). An order in accordance with this memorandum opinion will be entered.

UNITED STATES BANKRUPTCY COURT
M.D. Georgia
Athens Division

In the Matter of R. Scott APPLING,
Connie P. Appling, Debtors.

Lamar, Archer & Cofrin, LLP
Plaintiff

v.

R. Scott Appling, Defendant.

Bankruptcy No. 13–30083–JPS
Adversary No. 13–3042

Sept. 30, 2013

500 B.R. 246

MEMORANDUM OPINION

JAMES P. SMITH, Bankruptcy Judge.

Before the Court is Defendant's motion to dismiss Plaintiff's complaint on the ground that the complaint fails to state a claim upon which relief can be granted pursuant to Bankruptcy Rule 7012 and Fed.R.Civ.P. 12(b)(6). Plaintiff, in its complaint, objects to the dischargeability of its claim against Defendant pursuant to 11 U.S.C. § 523(a)(2)(A). The Court, having considered the motion, the response and the complaint, now publishes this memorandum opinion.

When challenged under Rule 12(b)(6):

> "To survive ... a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (quoting

> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 1974, 167 L.Ed.2d 929 (2007)). The plausibility standard "calls for enough fact to raise a reasonable expectation that discovery will reveal evidence" of the defendant's liability. *Twombly*, 550 U.S. at 556, 127 S.Ct. at 1965.

Miyahira v. Vitacost.com, Inc., 715 F.3d 1257, 1265 (11th Cir.2013). Accordingly, accepting as true the allegations in Plaintiff's amended complaint[1], Plaintiff's claim is based on the following facts.

Plaintiff is a law firm that represented Defendant and his company, Hartwell Enterprises, Inc. ("Hartwell"), in litigation in the Superior Court of Franklin County, Georgia. In March 2005, Plaintiff's unpaid legal fees for representing Defendant and Hartwell had grown to $66,710.57. Robert Lamar ("Lamar"), a partner of Plaintiff, had a meeting with Defendant and advised that Plaintiff would have to withdraw from the representation unless the legal fees were brought current. Defendant advised Lamar that his accountant had just prepared his 2004 tax return and that he would be receiving a tax refund in excess of $100,000. Defendant represented to Lamar that the tax refund would be sufficient to pay all outstanding fees and agreed to pay those fees, as well as subsequent fees, as soon as the tax refund was received if Plaintiff would continue to represent him and Hartwell and forego immediate collection of the past due amounts. In reliance upon this promise, Plaintiff

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[1] A hearing was held on July 2, 2013, on Defendant's objection to Plaintiff's motion to amend its complaint. For the reasons stated at the hearing, the Court has entered an order granting Plaintiff's motion to amend.

continued to represent Defendant and Hartwell and did not institute collection efforts.

In November 2005, Defendant again confirmed his promise to use his tax refund to pay all of Plaintiff's fees. Plaintiff continued to represent Defendant and his company and successfully settled the superior court litigation in March 2006. By this time, the unpaid fees had grown to $104,179.60. When Defendant did not pay these fees, Plaintiff obtained judgment against Defendant for this amount in the Superior Court of Hart County, Georgia.

Plaintiff alleges that when Defendant promised to use his tax refund to pay the fees, Defendant had no intent to do so or, in the alternative, had no reasonable basis to believe the refund would be sufficient to pay the fees. Plaintiff alleges that, through his knowledge of the distressed financial state of Hartwell, Defendant knew the refund would not be available for payment of the fees. Further, Plaintiff alleges that when it met with Defendant in November 2005, and Defendant renewed his promise regarding the tax refund, Defendant had already received the refund and spent the refund on the operations of Hartwell. Accordingly, Plaintiff alleges that its claim against Defendant arose as a result of Defendant's "false pretenses, a false representation, or actual fraud" and is therefore not dischargeable under 11 U.S.C. § 523(a)(2)(A).

DISCUSSION

11 U.S.C. § 523(a)(2) provides, in pertinent part:

(a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt—

. . .

> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—
>
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;
>
> (B) use of a statement in writing—
>
> (i) that is materially false;
>
> (ii) respecting the debtor's or an insider's financial condition;
>
> (iii) on which the creditor to whom the debtor is liable for such money, property, services or credit reasonably relied; and
>
> (iv) that the debtor caused to be made or published with intent to deceive . . .

Statement Respecting Defendant's Financial Condition

Defendant contends that his alleged oral representation regarding his intent to use his tax refund to pay the fees is not actionable under section 523(a)(2)(A) because the alleged representation is "a statement respecting the debtor's . . . financial condition" which, pursuant to section 523(a)(2)(B), must be in writing. As explained by the Bankruptcy Appellant Panel for the Sixth Circuit:

> Subsections (A) and (B) are mutually exclusive. All statements regarding a debtor's financial condition, whether written or oral, are expressly excluded from subsection (A). Rather, such a creditor must proceed under subsection (B) and satisfy the requirement that the statement of financial condition be in writing. A debt based upon an oral misrepresentation of financial condition is not

> actionable and will be dischargeable. Conversely, a debt obtained through fraudulent written statements about a debtor's financial condition will be nondischargeable. As a result of this construction, whether a debt under this section is dischargeable or nondischargeable depends on whether the fraudulent misrepresentation (i) is oral or in writing and (ii) whether the statement concerns the debtor's financial condition . . .
>
> Two views have emerged on the proper interpretation of the phrase "respecting the debtor's . . . financial condition." The "broad interpretation" includes any communication that has a bearing on the debtor's financial position. In other words, any communication addressing the status of a single asset or liability qualifies. The "strict interpretation," on the other hand, limits statements "respecting the debtor's . . . financial condition" to communications that purport to state the debtor's overall net worth, overall financial health, or equation of assets and liabilities.

Prim Capital Corp. v. May (In re May), 368 B.R. 85, 2007 WL 2052185, at *5–6 (6th Cir. BAP July 19, 2007) (unpublished decision) (internal citations omitted).

The Eleventh Circuit has not addressed this issue. The Fifth Circuit[2] and the Tenth Circuit[3] have adopted the "strict interpretation". The Fifth Circuit noted

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[2] *Bandi v. Becnel (In re Bandi)*, 683 F.3d 671 (5th Cir.2012), *cert denied* — U.S. ——, 133 S.Ct. 845, 184 L.Ed.2d 654 (2013).

[3] *Cadwell v. Joelson (In re Joelson)*, 427 F.3d 700 (10th Cir.2005), *cert denied* 547 U.S. 1163, 126 S.Ct. 2321, 164 L.Ed.2d 840 (2006).

that the Fourth Circuit, in *Engler v. Van Steinburg (In re Van Steinburg)*, 744 F.2d 1060 (4th Cir.1984), apparently followed the "broad interpretation."[4]

The Fifth Circuit noted that the Eighth Circuit's[5] construction of section 523(a)(2)(A) was consistent with the construction applied by the Fifth and Tenth Circuits.[6] *Id.* Bankruptcy courts have reached conflicting conclusions.[7] For the reasons set forth by the Fifth Circuit in *Bandi v. Becnel, supra*, this Court adopts the "strict interpretation" as to the meaning of "a statement respecting the debtor's ... financial condition".

This case is similar to the case of *Barns v. Belice (In re Belice)*, 461 B.R. 564 (9th Cir. BAP 2011). There, in connection with obtaining a loan, the debtor made a number of representations regarding specific assets and the probable sale of a business to provide a source of funds for repayment of the loan. The court, adopting the "strict interpretation", held that the representations:

> [R]elate to a handful of [debtor's] assets, but they do not reveal anything meaningful or comprehensive about his overall net worth. These statements do not purport to reflect all of [debtor's] assets, and they tell us nothing regarding his liabilities or any liens against any of his

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4 683 F.3d at 677.

5 *Rose v. Lauer (In re Lauer)*, 371 F.3d 406 (8th Cir.2004)

6 683 F.3d at 677.

7 *See Spencer v. Bogdanovich (In re Bogdanovich)*, 292 F.3d 104, 112–13 (2nd Cir.2002) (collecting cases).

> property.... Accordingly, under our interpretation of the financial condition phrase, [debtor's] alleged misrepresentations do not amount to a statement respecting his financial condition. At most, they are isolated representations regarding various items that might ultimately be included as assets in a balance sheet or in a statement of net worth.

Id. at 579. Similarly, in the case of *In re May*, *supra*, the court held that a promise by a debtor attorney that he would be able to repay a loan with fees he expected to receive from the settlement of a case was "not related to [his] overall financial health but ... related to a single debt and the potential of one source of income" and therefore was actionable under § 523(a)(2)(A). *Id.* at *7.

In the case at bar, the alleged misrepresentation is that a single asset, the tax refund, would be used to pay Plaintiff's legal fees. This is not a representation as to Defendant's overall financial condition or net worth.

In support of his position, Defendant relies on the case of *Baker v. Sharpe (In re Sharpe)*, 351 B.R. 409 (Bankr.N.D.Tex.2006). In that case, the debtor made an oral representation that he had hidden funds from his wife during their divorce and that the funds would be available to repay a loan as soon as the divorce was final. The court held that this representation concerned the debtor's financial condition and therefore was not actionable under § 523(a)(2)(A). However, in light of the subsequent decision by the Fifth Circuit Court of Appeals in *Bandi*, it appears that the *Sharpe* case has been abrogated.

In addition, Defendant relies on the case of *Bancorpsouth Bank v. Callaway (In re Callaway)*, 2006 WL 6589022 (Bankr.N.D.Ga. Nov. 28, 2006).

There, the debtor made oral representations to the creditor that he would receive substantial distributions from a trust each year and that this would provide him with funds to repay a loan. The court agreed that the "strict interpretation" was the proper approach in considering section 523(a)(2). Nevertheless, citing *Sharpe* and *Joelson* for support, it found that these statements were statements concerning the debtor's financial condition. *Id.* at *21.

Of course, as previously stated, it appears that *Sharpe* has been abrogated by the Fifth Circuit's *Bandi* decision. Further, the *Callaway* court's analysis of the Tenth Circuit's decision in *Joelson, supra,* appears flawed. The court analyzed *Joelson* by stating:

> The *Joelson* case involved a debtor who persuaded the plaintiff to loan her $50,000 by misrepresenting that her brother would give her money to repay the debt and that she would provide assets, including real estate and antique cars, to be used as collateral for the loan. The Bankruptcy Appellant Panel affirmed the bankruptcy court's holding that the statement regarding the fact that her brother would give her money to repay the loan was an oral statement respecting the debtor's financial condition, but that the statements regarding the particular assets to be used as collateral were not broad enough to be considered statements regarding her overall financial health. It appears that the only issue before the Tenth Circuit was the bankruptcy appellant panel's decision that the debtor's misrepresentation as to the ownership of the assets did not constitute a statement respecting the debtor's financial condition. The Tenth Circuit affirmed that decision, but did not have the

> opportunity to address the panel's decision that the statement regarding the debtor's ability to obtain money from her brother to repay the debt was an oral statement respecting her financial condition. At [sic] to that issue, the panel had concluded that this statement was a statement respecting financial condition because it involved her ability to generate income and "[e]ven the narrow interpretation includes statements of 'ability to generate income'" *In re Joelson*, 307 B.R. 689, 696 (10th Cir. BAP 2004).

Id. However, this analysis appears to be incorrect because the Tenth Circuit, in *Joelson*, stated, "Second, Joelson made representations as to her intention and specific ability to obtain financing from her brother to repay Cadwell's loan (the 'Repayment Representations')." 427 F.3d at 714. The circuit court then held:

> Similarly, the Repayment Representations are not a statement as to Joelson's overall financial health. Joelson's representation to Cadwell that Cadwell would be able to look to Joelson's brother for repayment is analogous to Joelson's representations to Cadwell that she owned one particular asset. Just as a statement about one of Joelson's assets is not a statement that reflects Joelson's overall financial health, and therefore does not 'respect [ ] the debtor's . . . financial condition,' a statement about one part of Joelson's income flow—the flow of funds from her brother—does not reflect Joelson's overall financial health. Therefore, the Repayment Representations also are not 'respecting the debtor's . . . financial condition'.

Id. at 715. Thus, because the Tenth Circuit reversed the holding of the Bankruptcy Appellant Panel in *Joelson*, the reliance by the court in *Callaway* upon the Bankruptcy Appellant Panel decision was in error.

In the case at bar, the Court finds that the alleged oral misrepresentation regarding the use of the tax refund to pay the fees was not a representation "respecting the debtor's ... financial condition". Accordingly, Plaintiff has stated a claim under section 523(a)(2)(A).

Promise of Future Act

Defendant also argues that to state a claim under section 523(a)(2)(A), the misrepresentation must be about current or past facts. Defendant argues that the alleged promise to pay fees with the tax refund was a promise to do a future act, which is not actionable under section 523(a)(2)(A).

As held by the Fifth Circuit in *Allison v. Roberts (In re Allison)*, 960 F.2d 481 (5th Cir.1992), under section 523(a)(2)(A), a misrepresentation must:

> [B]e of past or current acts; a promise to perform acts in the future is not considered a qualifying misrepresentation merely because a promise subsequently is breached. A debtor's misrepresentation of his intentions, however, may constitute a false representation within the meaning of the dischargeability provision if, when the representation is made, the debtor has no intention of performing as promised.

960 F.2d at 484 (citations omitted). In this case, Plaintiff's amended complaint alleges that when the promise was first made, Defendant knew that the refund would not be available to pay the fees because it

would be needed to keep his company, Hartwell, in business. Plaintiffs further allege that when the promise was renewed in November 2005, Defendant had no intent to perform because he had already received and spent the refund. Although it remains to be seen whether Plaintiff can prove these allegations, by alleging that Defendant never intended to perform as promised, Plaintiff's complaint states a claim for relief.

Justifiable Reliance

Defendant also argues that Plaintiff's complaint fails to state a claim because Plaintiff does not plead any facts to establish justifiable reliance on Defendant's promise. Although section 523(a)(2)(A), by its terms, does not contain a reliance requirement,[8] the Supreme Court, in *Field v. Mans*, 516 U.S. 59, 116 S.Ct. 437, 133 L.Ed.2d 351 (1995), concluded that Congress intended to adopt the common-law meaning of the terms "false pretenses, a false representation, or actual fraud" for purposes of section 523(a)(2)(A). 516 U.S. at 69, 116 S.Ct. at 443. Therefore, the Court ruled that, consistent with common-law requirements, a claim under section 523(a)(2)(A) requires "justifiable reliance". 516 U.S. at 70–76, 116 S.Ct. at 443–46.

The Court made clear that "justifiable reliance" allows the creditor to rely on the representation of the debtor unless there are facts known to the creditor that would have alerted him to the falsity of the debtor's representation. Thus, a creditor is entitled to rely on the debtor's representation that his property is free of

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[8] Contrast section 523(a)(2)(B) that specifically requires reasonable reliance on a false statement in writing regarding the debtor's financial condition.

liens without first conducting a title search of the public real estate records. 516 U.S. at 70, 116 S.Ct. at 444. On the other hand, a creditor is:

> [R]equired to use his senses, and cannot recover if he blindly relies upon a misrepresentation the falsity of which would be patent to him if he had utilized his opportunity to make a cursory examination or investigation. Thus, if one induces another to buy a horse by representing it to be sound, the purchaser cannot recover even though the horse has but one eye, if the horse is shown to the purchaser before he buys it and the slightest inspection would have disclosed the defect. On the other hand, [this] rule ... applies only when the recipient of the misrepresentation is capable of appreciating its falsity at the time by the use of his senses. Thus a defect that any experienced horseman would at once recognize at first glance may not be patent to a person who has had no experience with horses.

516 U.S. at 71, 116 S.Ct. at 444 (quoting Restatement of Torts, § 541, Comment a).

Defendant contends that:

> At the time of the alleged misrepresentation, there were too many unknowns for anyone, much less the sophisticated Plaintiff law firm here, to rely on ... In this case, Plaintiff did not know that the taxing authority would approve the return, the actual amount of the return, or the timing of the payment of the refund. Plaintiff apparently did not even take the opportunity to review the tax return itself. No document was drawn up to reflect any assignment of the funds from the tax return. There is not even

> a letter from Plaintiff to Defendant confirming the alleged conversations about the tax return.

Defendant's Motion To Dismiss, Docket No. 7, p. 6. However, Defendant misses the point of Plaintiff's complaint. Plaintiff does not allege that Defendant made a misrepresentation regarding the validity or amount of the refund. Indeed, in his answer, Defendant, "admits that he was entitled to a tax refund for the year 2004 which he reasonably believed in March 2005 would be approximately $100,000." Answer to Amended Complaint, Docket No. 15, paragraph 9. Rather, the alleged misrepresentation is Defendant's promise that he would use the refund upon its receipt to pay the fees when he had no intent to perform the promise when it was made.

Given the relatively low bar the creditor must clear to show justifiable reliance, it appears sufficient, at least for purposes of a motion under Rule 12(b)(6), for Plaintiff to have stated that it did justifiably rely on Defendant's promise. Accordingly, Plaintiff has stated a claim.

Amount of Damages

Finally, Defendant argues that Plaintiff is only entitled to those damages which arose after the alleged misrepresentation in March 2005. However, as explained by the court in *Foley & Lardner v. Biondo (In re Biondo)*, 180 F.3d 126 (4th Cir.1999):

> Through explicit language, Congress provided not only that debts incurred through the direct provision of money, property, or services, but also that the extension, renewal, or refinancing of credit, would fall under the purview of Bankruptcy Code § 523(a)(2)(A) . . .

> Section 523(a)(2)(A) covers debts incurred through the direct provision of 'money, property, [or] services.' As noted above, the primary debtor-creditor relationship is covered by § 523(a)(2)(A) through express language extending its scope to debts incurred through the direct acquisition of value. *See* 11 U.S.C. § 523(a)(2)(A) (including 'any debt ... for money, property, services'). Section 523(a)(2)(A), however, also reaches secondary debt transactions-extensions, renewals, and refinancing ...
>
> Our definition focuses on an 'extension' of credit as an autonomous transaction that results in the lengthening of a debtor-creditor relationship. *Black's Law Dictionary* defines extension as '[a]n allowance of additional time for the payment of debts.' *Black's Law Dictionary* 583 (6th ed. 1990). In other words, despite the fact that a debt may already be due, the creditor grants a reprieve to the debtor.... A extension of credit is analogous to the classic forbearance granted by a creditor in relation to a matured debt. Extensions of credit under 523(a)(2) are thus properly viewed as merely an agreed enlargement of time allowed for payment.

180 F.3d at 131–32.

See Ojeda v. Goldberg, 599 F.3d 712 (7th Cir.2010) (although original loan not obtained by fraud, extension procured by fraud made entire debt nondischargeable); *Wolf v. Campbell (In re Campbell)*, 159 F.3d 963 (6th Cir.1998) (fraudulently obtained extension of a nonfraudulent, dischargeable old debt renders debt nondischargeable even though debt was not collectable at time of extension because debtor was insolvent); *Cho Hung Bank v. Kim (In re Kim)*, 62 F.3d 1511 (9th

Cir.1995) (although original loan was obtained without fraud, extension obtained through false statement made debt nondischargeable even though no new money was advanced at time of extension); *Household Finance Corp. v. Greenidge (In re Greenidge)*, 75 B.R. 245, 247 (Bankr.M.D.Ga.1987) (Laney, J.) (false representation in connection with renewal or refinancing of credit renders entire debt nondischargeable).

In this case, at the time the alleged misrepresentation was made in March 2005, the outstanding legal fees owed by Defendant to Plaintiff were about $66,710. Those fees were due and payable at that time. By agreeing to continue to represent Defendant and his company and not to withdraw or attempt collection of the fees, Plaintiff gave Defendant an extension with respect to the fees then due. Accordingly, in addition to asserting a claim for the fees incurred after the alleged misrepresentation, Plaintiff may also assert a claim for the fees which had already been incurred due to the extension of time granted Defendant to pay those fees.

CONCLUSION

For the reasons stated herein, Defendant's motion is denied. A separate order in accordance with this memorandum opinion will be entered.